

NO. 2018-CR-7068

STATE OF TEXAS

VS.

JOHNNY JOE AVALOS

§ IN THE DISTRICT COURT
§ 4th COURT OF APPEALS
§ SAN ANTONIO, TEXAS
§ 437TH JUDICIAL DISTRICT
§ KEITH E. HOTTLE
§ BEXAR COUNTY, TEXAS
CLERK

MOTION FOR A NEW TRIAL

TO THE HONERABLE JUDGE OF SAID COURT:

COMES NOW, JOHNNY JOE AVALOS (Mr. Avalos), by and through his counsel, Jorge G. Aristotelidis, and files his Motion for a New Trial, and a request for a hearing on this motion, and shows:

I.

Background

On February 19, 2019, Defendant pled guilty to the offense of capital murder in the above-cited cause, and was sentenced to life without parole (LWOP). Prior to the plea, the Court entertained a motion to declare Tex. Crim. Pro. Section Texas Penal Code Sec. 12.31(a)(2) unconstitutional, on the grounds that it violates the Eighth Amendment to the United States Constitution and Article I, Sec. 13 of the Texas Constitution. In support of the motion, the Defendant offered, and the Court admitted, Exhibits A through D (also attached herein, as Exhibits A through D).

After Mr. Avalos pled guilty, the Court inquired whether there was any legal reason why Mr. Avalos should not be sentenced, to which the undersigned counsel

objected and reiterated his arguments in support of finding that Sec. 12.31(a)(2) violates the Eighth Amendment and Article I, Sec. 13 of the Texas Constitution, because it does not allow for a sentence other than LWOP, for an adult who is determined to be intellectually disabled. The Court overruled the objection on the record before proceeding with sentencing, the proper procedure to object to and to preserve sentencing errors for appeal. *See Mercado v. State*, 718 S.W.2d 291, 296 (Tex. Crim. App. 1986)(“As a general rule, an appellant may not assert error pertaining to his sentence or punishment where he failed to object or otherwise raise such error in the trial court.”); *Rhoades v. State*, 934 S.W.2d 113, 120 (Tex. Crim. App. 1996)(concluding appellant failed to preserve challenge to sentence under state constitution’s protection against cruel and unusual punishment because he did not object in trial court); *Curry v. State*, 910 S.W.2d 490, 497 (Tex. Crim. App. 1995)(concluding appellant failed to preserve challenge to sentence under federal constitution’s protection against cruel and unusual punishment because he did not object in trial court). There is, however, also authority that allows preservation of sentencing issues *via* motion for new trial. *See Rodriguez v. State*, 917 S.W.2d 90, 92 (Tex App. - Amarillo 1996, *pet. ref’d*)(“[N]othing is preserved for review because appellant failed to raise the severity of his sentence when punishment was assessed or in a new trial motion.”); *Chapman v. State*, 859 S.W.2d 509, 515 (Tex.App.--Houston [1st Dist.] 1993, no *pet.*) (“Further, nothing

is preserved for review because appellant failed to raise the severity of his sentence when punishment was assessed or in a new trial motion.”). In an overabundance of caution, Defendant files this motion for a new trial, as an additional measure to ensure that Mr. Avalos’ constitutional challenges are properly preserved for appellate review. Defendant hereby repeats his arguments, as raised in his pretrial motion (denied on the day of the plea), and as argued during the sentencing phase of the Defendant’s plea (also denied during this stage of the Defendant’s plea), for the Court’s consideration.

II.

Legal Arguments

The Defendant is intellectually disabled (ID), as determined and confirmed by all experts for the defense and the state who evaluated him. *See* reports by Defendant’s expert Dr. Joan Mayfield, as confirmed by Dr. Kate Glywasky (state’s expert), Dr. Brian Skop (state’s expert) and Dr. John Fabian (Defendant’s expert), attached and incorporated by reference as **Exhibits A, B, C and D**, respectively. The Defendant is therefore categorically ineligible for the death penalty. *Atkins v. Virginia*, 536 U.S. 304 (2002). Following its experts’ concurrence with Dr. Mayfield’s ID diagnosis, the state waived the death penalty against the Defendant. Upon his conviction for the offense of capital murder, the Defendant became subject

to an automatic life without parole (LWOP) sentence, the sole, default punishment applicable to an adult convicted of a capital offense in Texas.

The Texas Capital Murder statute is set out in Sec. 19.03 of the Texas Penal Code. The punishment for adults who are convicted of capital murder is set out in Sec. 12.31(a)(2). These sections set out that those convicted of capital murder shall be punished with either death or LWOP. Pursuant to these sections of the Texas Penal Code the determination of whether a person who is convicted of capital murder is eligible to be sentenced to death or LWOP depends on whether the person is over age 18. There is no provision under the statute for the person convicted of capital murder where death is waived that provides for a punishment hearing. Under current Texas law the default sentence for an adult convicted of capital murder is automatic LWOP. The U.S. Supreme Court has stated that LWOP shares some of the same characteristics of the death penalty. *Graham v. Florida*, 560 U.S. 48, 69 (2010), *Miller v. Alabama*, -- U.S. ---, at 16, 132 S.Ct. 2455 (2012).

III.

The Defendant would further show that under the capital murder scheme as set out in 12.31(a)(2), he is prohibited from presenting any evidence to mitigate against the imposition of the most severe sentence that he is now eligible to receive, or LWOP.

IV.

Defense attorneys representing capital murder defendants are required to meet certain guidelines, as established by the American Bar Association Guidelines for Capital Defenders, those contained in the United States Supreme Court's holding in *Wiggins v. Smith*, 539 U.S. 510 (2003); and the Guidelines and Standards for Texas Capital Counsel as promulgated by the State Bar of Texas. The guidelines require that defense counsel conduct a complete and thorough investigation of the capital defendant, his background, his mental health and whether or not he is ID, and further, to be prepared to present all evidence that would mitigate against the imposition of the most severe punishment that the law provides. However, despite all of the defense team's best efforts, there is no vehicle under the present Texas Capital Murder statute whereby a jury is allowed to hear any evidence on punishment or any evidence that would mitigate against the imposition of a LWOP sentence. The Defendant therefore argues that this sentencing scheme denies him the rights guaranteed him under the 4th, 5th, and 6th Amendments to the United States Constitution, and Article I, Sections 10 and 13 of the Texas Constitution.

The Defendant is denied effective assistance of counsel by law in implementing their obligations under the guidelines established by the American Bar Association Guidelines for Capital Defenders under *Wiggins v. Smith*, 539 U.S. 510 (2003), and the Texas State Bar's Guidelines and Standards for the Texas Capital

Counsel. This violates the Defendant's rights under the 6th Amendment to the Constitution of the United States and Article I, Sections 10 and 13 of the Texas Constitution.

V.

The Defendant challenges the constitutionality of the Texas Capital Murder statute under the Eighth Amendment's Cruel and Unusual Punishments Clause, which is made applicable to the State of Texas by the Due Process Clause of the Fourteenth Amendment, *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962) as applied to him as one who is ID, or as archaically referenced, "mentally retarded." The most severe sentence that he is exposed to in this case is LWOP since the state has waived the death penalty on the one hand, but also because he is *Atkins* death penalty-ineligible on the other. *Atkins, Id.*

VI.

In *Miller v. Alabama*, -- U.S. ---, at 16, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), the U.S. Supreme Court ruled that a LWOP sentence imposed on juvenile capital defendants violates the 8th Amendment to the United States Constitution. The *Miller* case followed the line of cases beginning with *Roper v. Simmons*, 543 U.S. 551 (2005), and *Graham v. Florida*, 560 U.S. 48 (2010). In Texas the legislature amended Sec. 12.31 to attempt to accommodate the *Roper* line of cases by holding that juveniles convicted of capital murder would be sentenced to life. Most recently

the Supreme Court gave emphasis to *Miller* by its holding in *Montgomery v. Louisiana*, No. 14-280 (2016); 577 U.S. ____ (2016), that made *Miller* retroactive, and on October 31, 2016, the Court returned *Tatum v. Arizona*, No. 15-8850; ____U.S.____ (2016), to the Arizona courts for consideration under *Miller* and *Montgomery. Id.*

VII.

The Defendant would also show that the *Roper* and *Atkins* line of cases have converged. Specifically, their rationales establishing categorical exemptions from the imposition of the death penalty and LWOP have merged. The Courts in *Atkins* and in *Miller* stated in similar ways that LWOP is a death sentence where the only difference is when death occurs. However, the characteristics of juveniles and the intellectually disabled are similar if not practically identical. Indeed, the Court has used essentially the same reasoning in the *Roper* line of cases as the rationale that conceived the *Miller* decision. As explained in Dr. Mayfield's report, practically all of the ID testing conducted on the Defendant resulted in the age equivalency of a juvenile, that is under age 18.

Additionally, The Eighth Amendment, which "reaffirms the duty of the government to respect the dignity of all persons," *Roper v. Simmons*, 543 U.S. 551, 560, prohibits the execution of persons with intellectual disability. No legitimate

penological purpose is served by executing those suffering from ID. *Atkins*, 536 U.S., at 317, 320; *Hall v. Florida*, 134 S.Ct. 1986 (2014).

The Supreme Court also considers whether a LWOP sentence serves legitimate penological goals. *Kennedy, supra*, 128 S.Ct., at 2661-65; [560 U.S. 68], *Roper, supra*, at 571-572; *Atkins*, 536 U.S., at 317, 320. *Roper* established that because juveniles have lessened culpability, they are less deserving of the most severe punishments. 543 U.S. at 569. As compared to adults, juveniles have a “lack of maturity and an underdeveloped sense of responsibility”; they “are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure”; and their characters are “not as well formed.” *Id.*, at 569-570. These salient characteristics mean that “[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.” *Id.*, at 573. Accordingly, “juvenile offenders cannot with reliability be classified among the worst offenders.” *Id.*, at 569. A juvenile is not absolved of responsibility for his actions, but his transgression “is not as morally reprehensible as that of an adult.” *Thompson, supra*, at 835. *Graham v. Florida*, 560 U.S. 48 (2010).

There an almost exact rationale in the juvenile categorical exemptions set out in *Roper* as there are in those set out in *Atkins*. The Court there stated that mentally

retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability. *See generally Atkins*, 536 U.S. 304.

It would be very difficult to distinguish the Court's rationale in *Roper* from that in the *Atkins* line of cases. Indeed, the rationales are virtually the same, and accordingly the comparison of one to the other is submitted as authority for the Court to grant the Defendant's motion to declare the Texas Capital Murder statute unconstitutional.

VIII.

The *Graham* case also likened LWOP sentences for juveniles to death sentences. LWOP sentences "share some characteristics with death sentences that are shared by no other sentences." 560 U.S. 48, at 69. And the court in *Graham* treated LWOP for juveniles like this Court's cases treat the death penalty, imposing

a categorical bar on its imposition for nonhomicide offenses. By likening LWOP sentences for juveniles to the death penalty, *Graham* makes relevant this Court's cases demanding individualized sentencing in capital cases. In particular, those cases have emphasized that sentencers must be able to consider the mitigating qualities of youth. In light of *Graham's* reasoning, these decisions also show the flaws of imposing mandatory LWOP sentences on juvenile homicide offenders. *Miller v. Alabama*, -- U.S. ---, at 16, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).

IX.

The Defendant is intellectually disabled. He has mitigation evidence to present that a jury could consider as militating against the imposition of a LWOP. **See generally Exhibits A, B, C and D.** The characteristics of persons with intellectual disability are similar and substantially the same as juveniles. The Supreme Court has held that juveniles are categorically ineligible for the imposition of the death penalty. *See Roper, supra*. The Supreme Court has held that mentally retarded (intellectually disabled) are categorically ineligible for the imposition of the death penalty. *See Atkins, supra*. The U.S. Supreme Court has held that juveniles are categorically ineligible for the imposition of a LWOP sentence. *Miller v. Alabama*, -- U.S. ---, at 16, 132 S.Ct. 2455 (2012). All three decisions were 8th Amendment cases that determined capital punishment was cruel and unusual for juveniles and the intellectually disabled. The Defendant is similarly situated as those capital

defendants in these cases and accordingly states that, as applied to him, the Texas Capital murder statute is unconstitutional and violates the 8th Amendment as well as the analogous provisions of the Texas Constitution.

X.

The Supreme Court has held that LWOP shares some of the same characteristics as the death penalty. *Graham*, 560 U.S. at 69 (2010). The Court said LWOP and the death penalty only vary in how the sentence is carried out. Either way, the result is death. The Supreme Court in *Lockett v. Ohio*, 438 U.S. 586 (1978) held that the Ohio mandatory death penalty, upon the finding of certain facts, was unconstitutional. The Court in *Lockett* explained that in order to meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigation factors. In 1978 the Ohio death penalty statute, like the present Texas Capital Murder statute, did not permit the type of individualized consideration of mitigation factors required by the Eighth and Fourteenth Amendments in capital cases. If convicted of capital murder in this case, the Defendant will be prevented from presenting any punishment evidence to mitigate against the imposition of a LWOP sentence, in violation of his rights as set out above in the United States Constitution and the Texas Constitution.

XI.

The Texas Capital Murder statute does not permit the sentencing scheme to enter into a proportionality analysis before the imposition of the default LWOP sentence, regardless of the underlying crime for which the Defendant is convicted. Additionally, the statute violates the finding in *Ring v. Alabama*, 536 U.S. 584 (2002) which held that only a jury may impose a death sentence. As the Court has found that LWOP is qualitatively the same as the death sentence in *Roper*, *Atkins*, *Graham* and *Miller*, then under the holding in *Ring* only the jury can impose a capital sentence. And, the jury must be given the opportunity to hear mitigating evidence against the imposition of a LWOP sentence. The law must give the jury a means of giving effect to this evidence and the Defendant an opportunity to lessen his moral blameworthiness.

Without the opportunity to mitigate against the imposition of a sentence of LWOP, the Defendant is denied his rights under the 4th, 5th, 6th, 8th and the 14th Amendment to the United States Constitution, his rights as guaranteed by Art. I, Sections 10 and 13 of the Texas Constitution, and as set out by the above-cited Supreme Court opinions.

PRAYER

WHEREFORE, the Defendant moves the Court to grant a hearing on the Defendant's motion for a new trial, and that it grant a new trial on the Defendant's

punishment. The Defendant then moves the Court to grant a new sentencing hearing, at which the Defendant be allowed to present the mitigation case that his lawyers have prepared pursuant to their obligations under the 6th Amendment, Art. I, Sec. 10, *Wiggins v. Smith*, *Lockett v. Ohio* and the various rights contained in the cases cited herein. At his new sentencing hearing, the Defendant moves that a jury be charged to impose a sentence, other than automatic LWOP, that is proportional to the crimes that the Defendant has committed, in light of his ID condition.

Respectfully submitted,

/s/ JORGE G. ARISTOTELIDIS
Attorney for Defendant

Law Office of JORGE G. ARISTOTELIDIS
310 S. St. Mary's St.,
Suite 1910
San Antonio, Texas 78205
(210) 277-1906
jgaristo67@gmail.com
SBN: 00783557

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing motion has been hand delivered to the District Attorney of Bexar County, Texas, Bexar County Justice Center, San Antonio, Texas, 78205, on the 21st day of March, 2019.

/s/JORGE G. ARISTOTELIDIS
Attorney For Defendant



NO. 2018-CR-7068

STATE OF TEXAS

VS.

JOHNNY JOE AVALOS

§ IN THE DISTRICT COURT
§
§ 437TH JUDICIAL DISTRICT
§
§ BEXAR COUNTY, TEXAS

ORDER

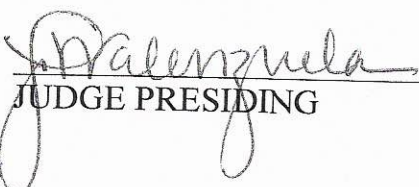
The Court has reviewed the Defendant's "Motion for a New Trial," and his request for a hearing, on the grounds that Texas Penal Code Section 12.31(a)(2) is unconstitutional, because it violates the 8th Amendment of the United States Constitution, and Article I, Sec. 13 of the Texas Constitution. After full consideration of the arguments in his motion, and the evidence submitted in the form of Exhibits A through D, same as if presented by the live testimony of its authors, the Defendant's motion for a new trial is hereby:

GRANTED

DENIED

The Court will hold a sentencing hearing where a jury shall be instructed to consider all necessary expert and mitigation evidence, for it to determine a punishment, other than automatic life without parole, that is proportionate to the Defendant's conduct.

Signed on this the 26 day of March, 2019.


JUDGE PRESIDING

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NO. 2018-CR-7068

STATE OF TEXAS

VS.

JOHNNY JOE AVALOS

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IN THE DISTRICT COURT

437TH JUDICIAL DISTRICT

BEXAR COUNTY, TEXAS

CERTIFICATE OF PRESENTMENT

By my signature, I acknowledge that the "Motion For a New Trial" in the above-referenced cause that was filed on the 21st day of March, 2019, and its request for a hearing, has been presented to me by the Defendant's counsel, Mr. Jorge G. Aristotelidis, within 10 days of its filing.


JUDGE PRESIDING

MAR 26 2019

Joan W. Mayfield, Ph.D.
Neuropsychologist
9735 Windham Drive
Dallas, TX 75243
Office 214-570-9737
Cell 972-978-5290

Supplemental Report Explanation of Neuropsychological Scoring

February 17, 2019

Re: The State of Texas vs. Johnny Avalos

Introduction to Scoring:

Once a test is administered, the number of correct answers are totaled. These total number of correct answers are called the Raw Score. Raw Scores on a test only have meaning when evaluating them against the performance of a referenced group. For convenience, the Raw Scores are usually converted to some form of a standardized scores based on a specific age group. These scores are generally in the back of the test manual. For example, if one is 20 years, 0 months old, then the person's scores would be compared to people in the normative group who are 20 years, 0 months old. The examiner would look at that chart in the manual, and find the derived score, which may include specific metrics such as: Standard Scores, Scaled Scores, and Percentiles. *Standard Scores* are ways to compare an individual's scores across individual tests. On test batteries with Standard Scores with a mean of 100 and standard deviation of 15, two-thirds of all individuals will obtain a score between 85 and 115. Standard Scores between 90 and 110 are often considered "average," though may be significantly below or above expectation for an individual, depending on other factors. *Subtest Scaled Scores* typically have a mean of 10 with a standard deviation of 2. Two-thirds of all individuals will obtain a Scaled Score between 8 and 12. Scaled Scores between 8 and 12 are often considered "average." *Percentiles* refer to the percent of peers around the United States that the test maker found to typically score below an individual's score. For example, a percentile (%ile) score of "70%" indicates that an individual performed better than 70% of peers taking that test.

These types of scores are generally used on test of intelligence and achievement. These type of scores were used to make the diagnosis of Intellectual Disability in a report dated May 14, 2017.

There are also grade- and age-equivalent scores which are used more frequently with children and adolescents. They are not Standard Scores or Scaled Scores, as mentioned above. When a test is administered to a group of children, the mean (or average) raw score is calculated for the grade or age. For example, if the test is given at the first month of the fourth grade and the mean number correct score is 35, then any child who earns a score of 35 is given a grade equivalent of 4.1. Age-equivalent scores are derived by determining the average score obtained by children at various ages. For example, if the average score of a 12 year-old child is 20 correct problems out of 35 problems, then any child earning a score of 20 on the same test would have an age-equivalent of 12 years, even if the child was 14 years old.

I do not use grade- or age-equivalent scores frequently, but I do find them helpful when trying to explain scores to parents or teachers when they are having difficulty understanding the level of the child I had evaluated. I especially find this to be helpful when a person is functioning cognitively or behaving lower than their age range. For example, if I am evaluating a child who is Intellectually Deficient and parents

are concerned with their child's behavior or cognitive functioning level, I can explain that even though their child is 6 years old, his/her scores on the testing are comparable to a child who is 3 years old. Then the parents are able to relate and determine appropriate ways to speak to or manage their child.

There are limitations of using age-equivalents (A-E).

- A-E are not comparable across different tests. Therefore, one cannot compare two A-Es on different tests.
- Since learning is not achieved at a constant rate, it is difficult to determine loss of gains in learning when comparing A-E.
- A difference in A-Es may be more significant at a younger age than at an older ages. For example, a 2 year difference between 6 and 8 is significant; however, a difference between 16 and 18 year old skills is less significant.
- In children, there is a misconception that a child should receive instruction based on the A-E. For example, if an 8 year old child scores at a 10 year old level in math, then that does not necessarily mean that the child is ready to work the same math problem as a 10 year old child.

How does this relate to Johnny Avalos?

On May 14, 2016, this writer evaluated Johnny Avalos. Based on the results of the testing, history, and adaptive functioning, Mr. Avalos was diagnosed with Intellectual Disability (formerly known as Mental Retardation). In the domain of Intellectual Functioning, his scores were significantly worse comparably to those of an average 16 year old. It is impossible to compare his score to a specific age, as the test administered (the Wechsler Adult Intelligence Scale-Fourth Edition) is not administered to adolescents under the age of 16. On a test of general reasoning ability, his scores were comparable to those of an average child less than 3 years 6 months.

In terms of academic skills, grade equivalents were available. His scores were comparable to those of average children ranging from grade 3, 6 months to grade 10, 8 months. His strength was word reading, and weaknesses were in sentence comprehension and math computation.

The remainder of the neuropsychological evaluation was completed on November 6 & 7, 2018.

Executive Functioning includes skills such as problem solving, generating strategies, planning, and verbal and visual cognitive flexibility (switching between two tasks). Mr. Avalos' scores in the area of Executive Functioning were as follows:

- Hands on problem solving skills were age appropriate. Abstract problems solving skills were more difficult. He was able to complete an average number of categories, but had many perseverative responses and required 82 trials to complete the 1st category (significantly impaired functioning). A-E were not available.
- Planning (sorting) scores were comparable to those of an average child less than 8 years old.
- Verbal Cognitive Flexibility scores were comparable to those of an average 9 year old child.
- Visual Cognitive Flexibility scores were comparable to those of an average child less than 8 years old.
- His scores on inhibition tasks were comparable to that of an average 11 year old child.

Mr. Avalos was administered tasks in the domain of attention that measured short term memory and sustained visual attention. On the short term attentional tasks, Mr. Avalos' performance was variable. His scores were comparable to those of average children ranging in age from age 8 to 11. His sustained visual attention was within normal limits.

Mr. Avalos' verbal and visual memory abilities were assessed. Overall, his visual memory abilities were superior to his verbal abilities. His performance on tasks of visual memory were variable. His scores were

comparable to those of average children with ages ranging from 8 to 14 years. In terms of verbal memory abilities, Mr. Avalos' scores were comparable to those of an average 5 year old when learning information presented in a context (stories) and that of an average child less than 5 years old when learning a list of words provided over repeated trials. After a thirty-minute delay, his scores were comparable to an average 5 year old child when recalling information presented in a context of information presented over repeated trials. When information was presented with verbal associations, his scores were similar to those of an average 5 year old child. His performance improved when information was provided visually and verbally simultaneously with his scores similar to that of an average 8 year old child.

Mr. Avalos' scores in the areas of vocabulary knowledge and ability to explain how words were similar were comparable to that of an adolescent under 16 years of age. His scores were comparable to an average adolescent ranging from 16 to 19 years old when required to name words that began with a specific letter. In contrast, his abilities were similar to that of an age 15 year old when naming words that belonged to a specific category. Receptive language skills were comparable to that of an average 10 year old child. Listening comprehension skills of words/sentences was similar to that of an average 5 year old child, while his comprehension of passages was similar to that of an average 4 year old child.

Scores of visual motor tasks were generally comparable to that of an average 11 year old child; however, his ability to copy designs was age appropriate. Manual dexterity, grip strength, and tapping were overall in the average range.

In summary, statistical analysis can be difficult to explain. I have provided scores sheets that contain the actual scores of Mr. Avalos' testing sessions. To help explain his scores, I have also provided information on how his scores on the tests compare to average children at specific ages (when available) in hopes that it will provide the court with more functional information about Mr. Avalos' performance on the tests administered.

Respectfully submitted,

A handwritten signature in cursive script that reads "Joan W. Mayfield, Ph.D." The signature is written in dark ink and is positioned above the printed name.

Joan W. Mayfield, Ph.D.

Joan W. Mayfield, Ph.D.
Neuropsychologist
9735 Windham Drive
Dallas, TX 75243
(214) 820-9808
Fax (214) 820-9878

Intellectual Disability Evaluation

Name: Johnny Avalos
Age: 29 years, 5 months
Date of Birth: December 1, 1986
Date of Evaluation: March 14, 2016
Date of Report: May 14, 2017
Examiner: Joan Mayfield, Ph.D., ABN, ABPdN

Re: The State of Texas vs. Johnny Avalos

REASON FOR REFERRAL

I was retained in the above mentioned case by his defense attorney, Gorge Aristotelidis. I was asked to administer an assessment to determine whether Johnny is a person with an intellectual disability (formerly known as mental retardation).

A federal statute in the United States (Public Law 111-256, Rosa's Law) replaced the term *mental retardation* with *intellectual disability*. The following definitions of intellectual disability were provided:

Intellectual disability is characterized by significant limitation both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18. [American Association on Intellectual and Developmental Disabilities (AAIDD); formerly known as American Association on Mental Retardation (AAMR), 2010].

Intellectual disability (intellectual developmental disorder) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains. [Diagnostic and Statistical Manual of the American Psychiatric Association, Fifth Edition, 2013 (DSM-5)].

"Intellectual disability" means significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period [591.003 (17a) of the Texas Health & Safety Code].

DOCUMENTS REVIEWED

Avalos Indictment
Justice for Natalie Chavez Timeline
Methodist Hospital
Text – Facebook Messages
University – Acute Care Records
University Health System
University Hospital Records – Johnny Avalos

University Hospital Records – Maria Avalos
Wilford Hall Medical Center
Edgewood I.S.D.
San Antonio I.S.D.
South San Antonio Independent School District
Somerset High School
Somerset Junior High School
Southwest General Hospital
San Antonio Police Department
Department of the Air Force
Letters to Crystal
Bexar County Hospital District

TECHNIQUES UTILIZED

Review of Records
Test of Memory and Malingering
Wechsler Adult Intelligence Scale – Fourth Edition (WASC-IV)
Wide Range Achievement Test – Fourth Edition (WRAT-IV)
Collateral Phone Interviews:
 Maria Avalos – Mother
 Crystal Avalos – Sister
 Jessie Beltran - Neighbor

BEHAVIORAL OBSERVATIONS

Testing was completed in the Bexar County Detention Center in an office in the Medical Unit. Johnny was neatly dressed in jail attire; he was clean and had a light beard. He maintained good eye contact. Prior to the beginning of the assessment, Johnny was informed of the reasons for testing and the lack of doctor-patient confidentiality. He was told of his right to participate or not to participate in the evaluation. He voiced understanding and agreed to participate. Although he did not initiate conversation, he engaged appropriately in conversation and answered all questions asked of him. He was very polite; he spoke with a soft voice and stuttered. He seems a little scared and nervous. Symptom validity measures were administered. Results of the TOMM were within normal limits. Therefore, the results are considered to be valid.

RESULTS, CONCLUSIONS AND OPINIONS

Following testing, which included a clinical interview, a review of documents, and collateral phone interviews, I have determined that Johnny meets criteria for a diagnosis of Intellectual Disability. As stated earlier, regardless of the definition used (AAIDD, DSM-5, or Texas Health & Safety Code), a diagnosis of intellectual disability is based on three criteria: 1) significant limitations in intellectual functioning; 2) significant limitations in adaptive behavior as expressed in conceptual, social, and practical skills; and 3) onset before age 18. My diagnosis is based on the following results:

1. The first criteria for this diagnosis is significant limitations in intellectual function. Individuals with intellectual disability have scores of approximately two standard deviations or more below the population mean, including a margin for measurement error (generally ± 5 points). On tests with a standard deviation of 15 and a mean of 100 (such as the WAIS-IV), this involves a score of 65-75 (70 ± 5). Although there are records that indicate that Johnny was in special education throughout his educational years, special education testing records have not been available. Therefore, there are no records of prior intellectual testing. There are school records indicating that he

began attending special education classes in third grade and had an ARD (admission, review, and dismissal meeting). Records indicated the Johnny was never in a regular education class setting; he was educated in a resource room or a self-contained mild/moderate/severe special education setting.

The WAIS-IV is a comprehensive measure of intelligence and was administered by this writer. Scores are as follows:

Wechsler Adult Intelligence Scale - Fourth Edition (WAIS-IV)

<u>Scale</u>	<u>Standard Score</u>	<u>95% Confidence Interval</u>	<u>Percentile Rank</u>	<u>Qualitative Description</u>
Verbal Comprehension (VCI)	66	62-73	1	Extremely Low
Perceptual Reasoning (PRI)	71	66-79	3	Borderline
Working Memory (WMI)	69	64-78	2	Extremely Low
Processing Speed (PSI)	81	75-91	10	Low Average
General Ability (GAI)	65	61-71	1	Extremely Low
Full Scale IQ (FSIQ)	66	63-71	1	Extremely Low

Johnny's intellectual scores are consistent with the presence of significant limitations in intellectual functioning.

2. Deficits in adaptive functioning (the second criteria) refers to how well a person meets community Standards 10.8 of personal independence and social responsibility, in comparison to others of similar age and sociocultural background. "Adaptive functioning may be difficult to assess in controlled settings (e.g. prisons, detention centers); if possible, corroborative information reflecting functioning outside those setting should be obtained" (DSM-5 – p. 38). Adaptive functioning consists of three domains: conceptual, social, and practical.
 - a. Conceptual Skills includes language; reading and writing; and money, time, and number concept. Prior school records indicate Johnny was placed in special education during the third grade. He was exempt from the Texas Assessment of Academic Skills (TAAS) due to his ARD in the fourth and fifth grade. When Johnny was in the 7th grade, his instructional level was at the third grade. In the 8th grade, he tested at the 3rd and 4th grade level for the Texas State-Developed Alternative Assessment (SDA). He dropped out of school in the 9th grade. Johnny was administered the WRAT-IV by this writer to measure his academic skills. Current testing indicated a strength in his phonetic abilities to read words; however, when required to read a short passage and insert a missing word based on contextual skills, his abilities were in the extremely low range. These same phonetic skills aided Johnny's spelling (low average range). Johnny exhibited extremely low abilities with his math skills. He was able to solve simple addition, subtraction, and one digit multiplication and division problems. He had difficulty with regrouping, fractions, and decimals.

Wide Range Achievement Test - Fourth Edition (WRAT-IV)

<u>Subject</u>	<u>Standard Score</u>	<u>95% Confidence Interval</u>	<u>Percentile Rank</u>	<u>Grade Equivalent</u>
Word Reading	91	83-100	27	10.8
Sentence Comprehension	64	58-73	1	3.6
Spelling	81	73-91	10	6.3
Math Computation	67	59-79	1	3.7
Reading Composite	75	70-81	5	N/A

- b. Social Skills include interpersonal skills, social responsibility, self-esteem, gullibility, naïveté (i.e., wariness), follows rules obeys laws, avoids being victimized, and social problem solving. Johnny was always withdrawn. He preferred to spend time by himself. He had one best friend growing up. He always appeared younger than his peers. According to Crystal, Johnny was frequently bullied in school and kids called him “weird” or “retarded.” Johnny did not have a good self-concept, he would say he was dumb and that he wished he wasn’t retarded. Although Crystal is 5-6 years younger than Johnny, she has always felt like he was her younger brother. Johnny never had a girlfriend. Mother reported that Johnny needed assistance to make decisions.
- c. Practical skills include activities of daily living (personal care), occupational skills, use of money; safety, health care, travel/transportation, schedules/routines, and use of the telephone. Johnny does not have a driver’s license, but he is able to ride a bicycle. He is able to get around to familiar places using the bus; however, he is not able to read a bus map and someone must teach him the route to go to new places. His mother would write down directions for him. There were a couple of times when he would call his mother because he got lost. He has never had a checking account and does not know how to manage money. Mother reported that she had to help him with his money. According to his sister, when he is given change, he would not know if the change was correct. He is not able to follow directions to cook for himself. He can use a microwave but not the stove or oven. If given a list of groceries and money, he would have difficulty buying the groceries and paying for them. For safety concerns, he was never given the responsibility to stay home and take care of the younger children. Johnny mowed the lawn for one of his neighbors. Johnny had to be taught to use the lawn mower. However, on one occasion, he put his hand down by the blades while the mower was running. Because of this, Mr. Beltran always supervised him when he was mowing the lawn. Johnny had trouble keeping up with the schedule of when to mow the lawn and would either return too soon or not come for a long time. When Johnny needed to fill out an application, his mother would write down the information and Johnny would copy the information onto the application. At other times his sister Crystal would go with him and fill out the job application for him. Johnny worked as a dishwasher for several years but was ultimately fired when he wrote a derogatory note on Facebook about his boss. According to his sister, Johnny did not understand why this made his boss mad and why he was fired. According to Crystal, Johnny (even as a young adult) required prompting from his mother to brush his teeth. She also helped him dress appropriately for the weather condition

Criterion 2 “is met when at least one domain of adaptive functioning (conceptual, social, or practical) is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more setting at school, at work, at home, or in the community.” (DSM-V-p. 38). Based on the information that is available at the time of this writing, Johnny meets significant impairment in the adaptive functional areas of conceptual and practical. At this time, more interviews are anticipated to gather more corroborative information.

- 3. Finally, the third criteria is onset during the developmental years, typically prior to age 18. Records indicated that Johnny always struggled in school and required special education support. Per his mother’s report, all of his developmental milestones were delayed. He was also late to learn to do things, such as to tie his shoes or button his shirt. Mother also reported that when Johnny was born his doctor stated that Johnny would always be “retarded.” There is clear evidence that Johnny’s intellectual and adaptive function occurred prior to the age of 18.

Based on information available at the time of this writing, Johnny meets criteria for a diagnosis of Intellectual Disability based on the information provided above. The opinions and conclusion provided in this case are the result of a review of the records, clinical interview, and the testing administered. I reserve the right to alter my

opinions if additional pertinent medical or related records become available. If I can provide additional information or assistance, please do not hesitate to contact me.

Respectfully Submitted,

A handwritten signature in black ink that reads "Joan W. Mayfield, PhD". The signature is written in a cursive, flowing style.

Joan Mayfield, Ph.D., ABN, ABPdN
Diplomate, American Board of Professional Neuropsychology
Diplomate, American Board of Pediatric Neuropsychology

Confidential Attorney Work Product
Joan Mayfield, PhD
Scoring for Johnny Avalos

Testing and Scoring by: Joan Mayfield, PhD
Testing Date: May 14, 2016 (ID testing)
Bexar County Detention Center, San Antonio, Texas
Client's DOB: December 1, 1986
Age at time of testing: 29 years, 5 months

Joan Mayfield, PhD

VALIDITY TESTING

TOMM – Trial 1 – 48/50; Trial 2 – 49/50; Retention – 50/50

INTELLIGENCE

Wechsler Adult Intelligence Scale - Fourth Edition (WAIS-IV)

	<u>Standard Score</u>	<u>Scaled Score</u>	<u>Age-Equivalent</u>
Verbal Comprehension	66		
Similarities		3	< 16:0
Vocabulary		4	< 16:0
Information		5	< 16:0
Perceptual Reasoning	71		
Block Design		6	< 16:0
Matrix Reasoning		4	< 16:0
Visual Puzzles		5	< 16:0
Working Memory	69		
Digit Span		4	< 16:0
Arithmetic		5	< 16:0
Processing Speed	81		
Symbol Search		5	< 16:0
Coding		8	< 16:0
Full Scale	66		

ACHIEVEMENT

Wide Range Achievement Test - Fourth Edition (WRAT4)

	<u>Standard Score</u>	<u>Percentile Rank</u>	<u>Grade-Equivalent</u>
Word Reading	91	27	10.8
Sentence Comprehension	64	1	3.6
Spelling	81	10	6.3
Math Computation	67	1	3.7
Reading Composite	75	5	

Confidential Attorney Work Product
Joan Mayfield, PhD
Scoring for Johnny Avalos
SECOND EVALUATION

Testing and Scoring by: Joan Mayfield, PhD
Testing Date: November 6 & 7, 2018
Place: Cadena Reeves Justice Center
Client's DOB: December 1, 1986
Age at time of testing: 31 years, 11 months

Joan Mayfield, PhD

VALIDITY TESTING

TOMM: 45/50; 50/50; 50/50
Dot Counting Test: E-Score – 14; E-Score Cut-Off - 15
15-Item: 15/15; cut off 12/15

INTELLIGENCE

Test of General Reasoning Ability (TOGRA)

	<u>Standard Score</u>	<u>Percentile</u>	<u>Age-Equivalent</u>
General Reasoning Index	52	0.1	< 3:6

ATTENTION/ EXECUTIVE FUNCTIONING

Delis-Kaplan Executive Function System

	<u>Scaled Score</u>	<u>Age-Equivalent</u>
Verbal Fluency		
Letter Fluency	9	16:0 – 19:0
Category	8	15:0
Category Switching Responses	4	< 8:0
Category Switching Accuracy	5	9:0
Free Sorting		
Confirmed Correct Sorts	6	< 8:0
Free Sorting Description Score	4	< 8:0
Sort Recognition		
Sort Recognition Description Score	5	< 8:0
Tower	10	30:0 – 39:00

Halstead Reitan Battery

Level of Impairment

Speech – Sounds Perception Test	Mildly to Moderately Impaired
Seashore Rhythm Test	Within Normal Limits

Conners' Continuous Performance Test-Third Edition (CPT3)

	<u>T-Score</u>	<u>Interpretation</u>
Detectability	48	Average ability to differentiate targets from non-targets
Omissions	43	Good performance; below average rate of missed targets
Commissions	58	Slightly above average rate of incorrect responses to non-targets
Perseverations	52	Average rate of random, repetitive, or anticipatory responses
HRT	44	Slightly Fast mean response speed
HRT SD	40	Above average consistency in reaction times
Variability	46	Average variability in reaction time consistency
HRT Block Change	49	Average change in response speed in later blocks
HRT ISI Change	43	Showed a good ability to sustain or increase response speed at longer ISIs

Issues related to: NO attention difficulties

Wisconsin Card Sorting Test – Computer Version 4

	<u>Raw Score</u>	<u>Standard Score</u>	<u>Percentile</u>
Perseverative Responses	33	82	12
Categories Completed	3		> 16
Trials to Complete 1 st Category	82		2-5
Failure to Maintain Set	0		> 16

Comprehensive Trail-Making Test (CTMT)

	<u>T Score</u>	<u>Percentile</u>	<u>Age-Equivalent</u>
Trail 1	37	10	9:0 - 9:11
Trail 2	38	12	11:0 – 11:11
Trail 3	23	< 1	< 8:0
Trail 4	24	< 1	< 8:0
Trail 5	24	< 1	< 8:0
	<u>Standard Score</u>		
Quotient Score	66	1	

Reynolds Interference Task (RIT)

	<u>T-Score</u>	<u>Standard Score</u>	<u>Percentile Rank</u>	<u>Age-Equivalent</u>
Object Interference	36		8	11:0
Color Interference	37		10	11:0
Total Correct Index		77	6	

MEMORY

Test of Memory and Learning-Second Edition (TOMAL-2)

<u>Indexes</u>	<u>Standard Score</u>	<u>Percentile Rank</u>	
Verbal Memory Index	65	1	
Nonverbal Memory Index	76	5	
Composite Memory Index	66	1	
Delayed Verbal Recall Index	70	2	
Attention/ Concentration Index	85	16	
Sequential Recall Index	84	14	
Free Recall Index	77	6	
Associative Recall Index	77	6	
Learning Index	58	< 1	
	<u>Scaled Score</u>	<u>Percentile Rank</u>	<u>Age-Equivalent</u>
Memory for Stories	4	2	5:0
Word Selective Reminding	1	< 1	< 5:0
Object Recall	6	9	8:0
Paired Recall	8	25	5:6
Facial Memory	6	9	9:0
Abstract Visual Memory	10	50	> 14:9
Visual Sequential Memory	7	16	11:0
Memory for Location	4	2	8:0
Digits Forward	8	25	10:6
Letters Forward	7	16	8:0
Digits Backward	7	16	11:0
Letters Backward	8	25	11:0
Manual Imitation	9	37	14:0
Visual Selective Reminding	1	< 1	< 5:0
Memory for Stories (Delayed)	5	5	5:6
Word Selective Reminding (Delayed)	6	9	5:0

LANGUAGE

Boston Naming Test – Significantly Impaired

Comprehensive Receptive and Expressive Vocabulary Test – Third Edition – CREVT - 3

	<u>Standard Score</u>	<u>Percentile Rank</u>	<u>Age-Equivalent</u>
Receptive Vocabulary	71	3	10:0

Academic Achievement Battery (AAB)

	<u>Standard Score</u>	<u>Percentile Rank</u>	<u>Age=Equivalent</u>
Listening Comprehension	≤ 50	< 0.1	
Listening Comprehension – Words/Sentences	≤ 50	< 0.1	5:2
Listening Comprehension – Passages	59	0.3	4:6

MOTOR AND VISUAL PERCEPTUAL

Developmental Test of Visual Perception – Adolescent and Adult

	<u>Index Score</u>	<u>Scaled Score</u>	<u>Percentile</u>	<u>Age-Equivalent</u>
Motor-Reduced Visual Perception	85		16	
Figure-Ground		7	16	11:0 – 11:11
Visual Closure		8	25	11:0 – 11:11
Form Consistency		8	25	11:0 – 11:11
Visual-Motor Integration	79		8	
Copy		11	63	23:0 – 29:0
Visual-Motor Search		6	9	11:0 – 11:11
Visual-Motor Speed		3	1	< 11:0
General Visual Perception	80		9	

Grooved Pegboard

	<u>Scaled Score</u>
Dominant Hand	9
Non-Dominant Hand	7

Grip Strength

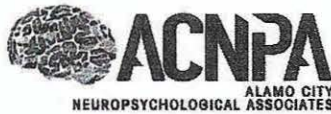
	<u>Scaled Score</u>
Dominant Hand	9
Non-Dominant Hand	9

Tapping

Scaled Score

Dominant Hand
Non-Dominant Hand

9
9



Kate E Glywasky, Psy.D., ABPP
ALAMO CITY NEUROPSYCHOLOGICAL ASSOCIATES
3603 Paesanos Parkway, Suite 300
San Antonio, Texas 78231
alamocitynpa@gmail.com
P: (210)831-3619 F: (210)994-9543

COGNITIVE EVALUATION: STATE OF TEXAS V. JOHNNY JOE AVALOS

14 MAR 2018

Name:	Johnny Avalos
Cause #:	2016CR10374
DOB:	1 DEC 1986
DOE:	8 FEB 2018
Ethnicity:	Hispanic
Education:	7 th grade

REASON FOR REFERRAL

This evaluation was conducted to assess Mr. Avalos's cognitive functioning and to determine if he meets the diagnostic and legal criteria for Intellectual Disability. Mr. Avalos is facing two indictments for Capital Murder involving four San Antonio women from 2015 to 2016. He is currently held at Bexar County Adult Detention Center. This evaluation was requested by the District Attorney, who hired this evaluator.

RECORDS REVIEWED

- Bexar County Hospital Medical Records of defendant's mother (APR 1992, JUN 1995- Illegible)
- University Hospital Emergency Department Handwritten Records of defendant's mother (JUN 1995 & JUL 1996)
- School Records (Edgewood ISD, San Antonio ISD, Somerset Junior High School)
- Social Security Disability Receipt (29 NOV 1999)
- Southwest Mental Health Center (23 to 26 SEP 2002)
- Intellectual Disability Evaluation by Joan Mayfield, Ph.D., ABN, ABPdN (14 MAR 2016)
- Psychological Evaluation for Competency to Stand Trial by Raleigh Wood, Ph.D. (26 SEP 2017)
- Document Outline Basic History- Handwritten (26 DEC 2017)
- Supreme Court of United States Moore vs. Texas

Mr. Avalos was born following a full-term pregnancy. A psychosocial assessment conducted in SEP 2002 cited Mr. Avalos as a colicky child who was excessively irritable and difficult to comfort. Developmental milestones were delayed for physical, cognitive, and social functioning: sitting without support was delayed and occurred at 12 months; speaking in sentences was delayed and occurred at 4.5 to 5 years old. He had one friend while growing up, but reportedly was frequently picked on by peers.

Mr. Avalos was born and raised in San Antonio, Texas. He was primarily raised by his mother, although his biological father also resided with the family at different times. Mr.

EXHIBIT B

Avalos grew up with five siblings. His sister died of crib death when patient was nine years old. Records from Southwest Hospital cited that Mr. Avalos blamed himself for her death. Although there were no records available to confirm his initial psychiatric hospitalization in 1999, inpatient records from Southwest Mental Health Center indicated Mr. Avalos was psychiatrically hospitalized in at Nix Hospital in 1999 for command hallucinations (i.e., voices telling defendant to hurt his brother and sister with a hammer, and to hurt his father with a hammer and candle).

The defendant's Southwest Mental Health Center (SMHC) records also provided details of his hospitalization course in their facility from 23 to 26 SEP 2002. At the time, the defendant was hospitalized for uncontrolled anger, and hallucinations commanding him to kill his father. Records site that defendant had physically hit his 5-year-old and 14-year-old brothers five days before hospitalization, causing one of the brothers to have a bloodied nose. Aggravating stressors at the time included a fire in his home that caused most of his possessions to be burned down a few months prior. During hospitalization, he threatened his mother by stating, "You'll be sorry if you leave me here." His mother noted that defendant had become "fixated on losing his 'stuff,' was not sleeping at night, exhibited paranoid ideations (e.g., feeling that "someone" was trying to hurt him. The defendant was vague when responding to questions about substance abuse. On one encounter he talked about previous use of alcohol and marijuana, other discussed use of marijuana at the time. Urine drug screen on 25 SEP 2002 was negative for recent substance use.

According to SMHC 2002 records, the defendant's cognitive functioning was estimated as "below average." His cognitive development was also described as "Below" for problem solving. Cognitive testing was recommended to rule out a diagnosis of Borderline Intellectual Functioning. Cognitive testing was never conducted.

The defendant received an intellectual disability evaluation on 14 MAR 2016 by psychologist Joan Mayfield, Ph.D., who was retained by the defense. The evaluation cited a longstanding history of academic and learning problems. He was placed in special education classes during the third grade, and then placed on an ARD (admission, review, and dismissal) plan. He was exempt from the Texas Assessment of Academic Skills (TAAS) due to his ARD in the fourth and fifth grades. When he was in the seventh grade, his instructional level was at the third-grade level. He left school during his eighth-grade year. He does not have a GED. His intellectual functioning equated to the Extremely Low range (1st %ile), and skills that were measured (both verbal and non-verbal) generally ranged between the 1st and 3rd %ile for his age.

Dr. Mayfield also opined that the defendant showed deficits in adaptive functioning (conceptual, social and practical skills). His conceptual skills were deficient for his age based on the following test scores: basic math skills falling the 1st %ile for his age, and reading comprehension falling in the 1st %ile range for his age. Dr. Mayfield opined that the defendant showed deficiencies in social skills (e.g., problem solving when dealing with social situations; interpersonal skills, social appropriateness and understanding; interpersonal skills; and social responsibility) after speaking with Mr. Avalos's sister, who is five years younger than Mr. Avalos. According to the sister, he always appeared younger than his peers, had only one "best friend" growing up, and was frequently bullied. Poor

interpersonal skills and problems solving were also cited in his medical records from SMHC in 2002, which substantiates his sister's claims (e.g., emotional development that was "below age" for response to stress and response to discipline, and referral for additional testing to rule out Borderline Intellectual functioning).

In terms of practical skills, Mr. Avalos never learned to drive an automobile, but previously traveled via bicycle. He was also able to travel to familiar places using the San Antonio bus system. His previous jobs consisted of mowing his neighbor's lawn and working two years as a dishwasher for a local Mexican restaurant. He was terminated from the job for criticizing his boss. He was unemployed at the time of his arrest for the current charges.

Mr. Avalos was evaluated by neuropsychologist Joan Mayfield, Ph.D. of Dallas, Texas on 14 MAY 2017. The evaluation showed that Mr. Avalos's Full-Scale IQ (FSIQ) fell in the Extremely Low range (1st %ile), and that most of the areas which comprised the FSIQ ranged between the 1st to 3rd %iles (Verbal Comprehension, Perceptual Reasoning, Working Memory). Ultimately, Dr. Mayfield opined that the claimant met criteria for an Intellectual Disability based on IQ scores and limitations in adaptive functioning, and onset occurring before age 18.

PROCEDURES AND TEST RESULTS

Mr. Avalos reviewed and signed consent form; Review of Above Records; Clinical Interview; Mini Mental Status Exam (MMSE); Wechsler Adult Intelligence-Scales-IV; Token Test; Wide Range Achievement Test-IV: Sentence Comprehension and Word Reading; Victoria Symptom Validity Test (VSVT); Repeatable Battery for the Assessment of Neuropsychological Status-Update; Medical Symptom Validity Test

PERFORMANCE VALIDITY: Mr. Avalos was administered multiple neuropsychological tests that double as performance validity or "effort" measures. All were selected a priori. A false positive rate analysis was conducted for the scores obtained, using cut off scores derived from empirically-based research of clinically and demographically similar examinees, and based upon guidelines established in Slick, Sherman and Iverson (1999). Slick, et al. (1999) is considered the gold standard for assessing performance validity and malingering of neurocognitive dysfunction.

Mr. Avalos's test results appear to be a valid representation of his neurocognitive functioning at the time of the evaluation. Specifically, Mr. Avalos performed adequately on most stand-alone and embedded validity measures included in the test battery. Therefore, diagnoses of Definite or Probable Malingering of Neurocognitive Dysfunction could not be given. It should also be noted that Mr. Avalos's current WAIS-IV IQ scores are very similar to his MAY 2017 scores, which would be extremely difficult to mimic, even amongst individuals with frequent exposure to the test.

NORMS: Examinee's scores were classified according to Wechsler Classification Systems. Test performance is classified into the following ranges: Severe Impairment ($\leq 1.0\%$ ile), Moderate Impairment (2.0%ile), Mild Impairment (3.0-4.0%ile), Borderline

Impairment (5-8%ile), Low Average (9-24%ile), Average (25-74%ile), High Average (75%-90%ile), Superior (91%-99%ile), WNL = Within Normal Limits. Norms for performance descriptions are based on peers of similar age (and education level and gender, if possible) who have not sustained a brain injury.

PREMORBID INTELLECTUAL FUNCTIONING: Based on a combination of educational history, demographic information, and portions of the current evaluation, Mr. Avalos's premorbid IQ was estimated to fall in the Intellectually Deficient to Borderline range compared to same-aged peers.

INTELLECTUAL FUNCTIONING: Mr. Avalos was given the Wechsler Adult Intelligence Scales-IV, which was initially conducted in MAR 2016. Overall, his initial and current performances are commensurate. There was a 23-month interval between initial and follow-up testing, which helped to ensure there was no practice-effects.

Mr. Avalos's Full-Scale IQ falls in the Extremely Low range, or 1st %ile, compared to same-aged peers. A review of his composite scores shows generally similar performances across domains measured. Therefore, his Full-Scale IQ adequately represents his overall intellectual functioning.

WAIS-IV	Index	PERCENTILE	DESCRIPTION
Verbal Comprehension Index	68	2 nd %ile	Extremely Low
Perceptual Reasoning Index	77	6 th %ile	Borderline
Working Memory Index	69	2 nd %ile	Extremely Low
Processing Speed Index	76	5 th %ile	Borderline
Full Scale IQ	67	1 st %ile	Extremely Low

ATTENTION & WORKING MEMORY: Mr. Avalos's attention abilities were much weaker than same-aged peers. His ability to repeat back number sequences, which tests both verbal attention and working memory equates to Borderline range, or 5th %ile, on both screening and IQ measures of this task.

WAIS-IV Digit Span	5 SS	5 th %ile	Borderline
RBANS-Update Digit Span	5 SS	5 th %ile	Borderline

IMMEDIATE AND DELAYED MEMORY: Mr. Avalos was administered visual and verbal tasks to measure learning and memory abilities. He was also asked to recall important dates, sequences of events, and autobiographical information to measure long-term memory. In terms of his ability to recall newly presented information, often referred to as

short-term memory, he was weaker than same-aged peers. His ability to learn a list of words read aloud to him multiple times falls in the Severely Impaired, or <1st %ile range. His Severely Impaired performance on delayed trials of this task indicated that the list of words was not initially learned. On a story memory task, which is also a measure of verbal memory, his performance falls in the Severely Impaired range (<1st %ile) when attempting to learn the story during initial trials. Following an extended delay, his ability to recall facts from the story equates to Low Average range (9th %ile). Mr. Avalos's visual memory appears to be significantly stronger than his verbal memory as evidenced by his High Average range performance (75th %ile) on this task.

RBANS-Update Immediate Memory Index	49	<1 st %ile	Severely Impaired
RBANS-Update Delayed Memory Index	68	2 nd %ile	Moderately Impaired

LANGUAGE FUNCTIONING: Mr. Avalos performance on tasks measuring language skills was much weaker than same-aged peers. It is strongly suspected that his low scores on these tasks are partially due to limited environmental exposure. Specifically, Mr. Avalos only attended up until the eighth grade, and grew up poor.

On a picture naming task, which measures his ability to retrieve a word to match the picture shown, falls in the Impaired range (<2nd %ile) for his age. Additionally, his performance on other measures typically learned in school such as vocabulary and factual knowledge both equate to Borderline Impaired range (5th %ile). On a semantic fluency task, which relies on vocabulary and ability to quickly name words belonging to a specific category, his performance fell in the Severely Impaired range (<1st %ile) for his age.

Mr. Avalos's performance on a token test, which measured his ability to understand and follow commands, was intact. His reading achievement score of 84 equates to Low Average range, and appears to be a relative strength for him. His sentence comprehension achievement score, which measures reading comprehension and reasoning equates to the Extremely Low range (2nd %ile) for his age.

RBANS-Update Language Index	47	<1 st %ile	Severely Impaired
WRAT-4 Reading	84	14 th %ile	Low Average
WRAT-4 Sentence Comprehension	70	2 nd %ile	Extremely Low
WAIS-IV Vocabulary	5	5 th %ile	Borderline Impaired
WAIS-IV Information	5	5 th %ile	Borderline Impaired

Token Test	46	>16 th ile	WNL
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PROCESSING SPEED: Mr. Avalos's speed of information processing falls in the Borderline Impaired range, or 5th %ile, for his age. Tasks which were included in this domain required him to visually scan and identify different targeted shapes and decode different numbers with paired symbols.

WAIS-IV Processing Speed Index	76	5 th %ile	Borderline
WAIS-IV Symbol Search	5 SS	5 th %ile	Borderline
WAIS-IV Coding	6 SS	9 th %ile	Low Average
RBANS-Update Coding	4 SS	2 nd %ile	Moderately Impaired

SUMMARY

Mr. Avalos is a 31-year-old Hispanic man who is being charged under two indictments of Capital Murder, involving his alleged role in causing the deaths of four women. The State is seeking the death penalty. **Based on records reviewed, clinical presentation and test results, the defendant meets diagnostic criteria for Intellectual Disability in accordance with Diagnostic Statistical Manual-5 (DSM-5) and the American Association on Intellectual Developmental Disabilities-11th Edition (AAIDD-11).** A diagnosis of Intellectual Disability is based on three criteria: 1) significant limitations in intellectual functioning; 2) significant limitations in adaptive behavior as expressed in conceptual, social and practical skills, and 3) onset before age 18.

In Mr. Avalos's case, his previous and current Full-Scale IQ scores fall below the cut-off score (70 \pm 5). School records state he first received special education in the 3rd grade, and he performing well-below his grade levels from grades 5 to 7 despite receiving additional assistance in his assigned resource room. Historically, Mr. Avalos's conceptual skills (reading and practical knowledge) have been viewed as low. During his 2002 inpatient psychiatric stay, medical personnel rated his emotional development as "below age" for response to stress and response to discipline. Also, his cognitive development was described as "Below" for problem solving, and school records outline a history of academic struggle which support that his intellectual and adaptive function occurred prior to age 18. Dr. Mayfield's 14 MAY 2017 testing cited scores falling in the Extremely Low (<1st %ile), and defendant successfully passed validity measures given at the time.

It should be noted that the defendant's estimated IQ score on 26 SEP 2017 was based on the Test of Nonverbal Intelligence-4, which is a 15-minute screening test (compared to the 90-minute WAIS-IV IQ test) that does not take into consideration most skills that generally comprise IQ, such as verbal skills, memory, processing speed, and social problem solving. His cited Average range index score of 90 appears to be a gross overestimate of his current level of intellectual functioning.

DISCLAIMER

This evaluation is based on all information available at the time of this evaluation report. This examiner reserves the right to change or alter her opinion, or alter recommendations to the employer, if additional information is made available. Recommendations and conclusions are given with a highly probable degree of psychological accuracy.

Please do not hesitate to contact me at 210-831-3619 if you need additional information or if I can be of further assistance.

Kate Glywasky Psy.D.

Kate E. Glywasky, Psy.D., ABPP
Board Certified Clinical Neuropsychologist,
Licensed Clinical Psychologist
Alamo City Neuropsychological Associates

Forensic Psychiatric Examination
Johnny Avalos
Cause No.: DC2016CR10374 &
DC2016CR10875
April 5, 2018
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April 5, 2018

The Honorable Lori Valenzuela
Judge, 437th Judicial District Court
Bexar County Justice Center
300 Dolorosa
San Antonio, Texas 78205

Re: Johnny Avalos
Cause No.: DC2016CR10374 & DC2016CR10875
Forensic Psychiatric Examination

Dear Judge Valenzuela:

Per your request, I examined Johnny Avalos to determine whether he has an intellectual disability on 12/26/2017. He was referred to Kate E. Glywasky, Psy.D. for psychometric testing. Her report is attached.

Confidentiality Statement: Mr. Avalos was advised of the nature of the interview as a forensic psychiatric evaluation ordered by the court. I reviewed with him the advice of rights as pertains to the examination. He was advised that no doctor/patient relationship was being established through participation in the examination. He was advised of the limits of confidentiality and that a report of the findings would be submitted to the courts. He appeared to understand the nature of the examination and agreed to proceed.

Sources of Information:

1. Forensic psychiatric evaluation, Medical Department, Bexar County Adult Detention Center.
2. Health care records, UHS Detention Health Care Services.
3. Police department report of the arrest.
4. Videos of police interviews of Mr. Avalos on 4/21/15, 1/26/16, and 2/9/16.
5. Jail calls, 4/25/15 to 7/24/17.
6. Jail video visits, 10/1/16 to 7/10/17.
7. Clarity Guidance Center records.
8. Lanier High School records.
9. San Antonio School District records.
10. Medical records for Maria Avalos.
11. Competency Evaluation, dated 9/26/17, by Raleigh D. Wood, Ph.D.
12. Intellectual Disability Evaluation, dated 5/14/17, by Joan Mayfield, Ph.D.
13. Intellectual Disability Evaluation, dated 3/14/18, Kate Glywasky, Psy.D.

Forensic Psychiatric Examination

Johnny Avalos

Cause No.: DC2016CR10374 &

DC2016CR10875

April 5, 2018

Page 2

14. Moore v. Texas, Supreme Court of the United States, 3/28/2017.

Identifying Information: Mr. Avalos is a 31-year-old single man who was living at his aunt's home in San Antonio, Texas, prior to his arrest. His date of birth is 12/1/86. His SID number is 829184. He is currently awaiting charges for Capital Murder.

Current Complaints: Ms. Avalos reported feeling depressed in jail. He said things seem less interesting. He said he does not laugh like he used to. He reported occasional problems with sleeping. He was not sure why he was having difficulty. He denied prior psychiatric treatment. He denied prior psychiatric hospitalizations. He reported that he reported he was hearing voices earlier in 2017 in an effort to try to get to the State Hospital; however, he denied that he has actually experienced voices or visions. He denied paranoia, grandiosity, ideas of reference or other psychotic symptoms. He denied a history of reduced need for sleep, racing thoughts, pressured speech, elevated or persistently angry mood, or other manic symptoms. He denied a history of suicidal ideations or attempts. He denied problems with anger control. He denied obsessive compulsive disorder symptoms or problems with anxiety.

Past Psychiatric History: None reported.

Family Psychiatric History: None reported. He did report that he had family members that abused cannabis.

Family Medical History: He reported that diabetes mellitus runs in his family.

Past Medical History: He reported that he was in a motor vehicle accident when he was 16 years old. He said he had been drinking. He had a broken arm and ribs. He did not have a loss of consciousness. He denied head injuries. He denied seizures. He had asthma.

Past Surgical History: He had surgery on a broken arm. He had abdominal surgery (possibly an appendectomy).

Medications: He said he is on Zoloft (a medication for depression and anxiety) and another medication for anxiety.

Substance Use:

1. **Alcohol:** He reported that prior to his arrest he drank daily. He said he would drink a 12 pack of Bud Light or two 24 ounce malt liquors. He denied prior alcohol related arrests. He denied alcohol withdrawal. He denied complaints from others about his drinking or making efforts to cut back.
2. **Drug:** He reported that he used heroin. He said his last use was 3-5 years ago. He injected it. He was using \$20 per day. He said he would get the money for this by donating plasma or working. He has prior drug related arrests. He had withdrawal from heroin. He participated in drug rehabilitation through a church program. He also reported using marijuana. He said his last use was 2 years ago. He smoked this daily. He smoked a joint per day. He denied arrests related to his marijuana use. He denied using synthetic marijuana.

Developmental/Psychosocial History:

1. **Development:** He was born and raised in San Antonio. He has 4 brothers and 2 sisters. He was the second child. His father worked with fiberglass. His mother did homecare for the elderly. His parents divorced when he was 25 years old. He denied experiencing abuse or neglect while he was growing up.
2. **Education:** He reported that he attended Lanier High School. He went to the 9th grade. He reported he had problems getting up for school and was frequently truant. He reported his mother kept having to go to court for this. He also got in trouble for smoking marijuana at school. He believed that he was in special education from the 4th grade until when he left school. He recalled being in special education for problems with math and reading. He said he never has had a bank account or drivers license. He would use check cashing services to pay his bills. He took the bus to work and rode a bicycle. He thought he had participated in algebra classes as his highest level of math.
3. **Work History:** He worked as a dishwasher at a local restaurant for 5 years. He has done some basic labor work such as working at a car wash and a bakery.
4. **Military History:** None reported.
5. **Legal History:** He reported that he was charged with stealing a car.
6. **Relationship History:** He reported he is single. He has no children. His longest relationship was for 1 year and was while he was in middle school. He has been in few dating relationships and said he felt uncomfortable talking to women he was interested in. He said he would hire prostitutes.

Mental Status Exam:

1. **Behavior and Dress:** Mr. Avalos was groomed. He was generally cooperative with the evaluation. He had normal eye contact and kinetics. He did not appear to be attending to internal stimuli.
2. **Speech:** His speech was of normal rate, volume and spontaneity.
3. **Mood and Affect:** His mood was reported as anxious. His affect was full range and consistent with his mood.
4. **Thought Processes:** His thought processes were linear, logical and goal directed; there was no disorganization.
5. **Thought Content:** He was not reporting suicidal or violent ideations. He did not appear to be experiencing hallucinations or delusions.

6. **Cognition and Intelligence:** He was able to read at a basic level. He did simple single digit addition and multiplication problems where the total did not exceed 10. He had difficulty with more complicated addition, subtraction, multiplication and division. He was able to list the last 5 presidents in order. He knew the president assassinated in the 1960s was John F. Kennedy. He was oriented to date, person, location and situation. He was able to register 3 items and recall them after a period of distraction.
7. **Insight and Judgment:** Generally intact.

Conclusion:

Mr. Avalos has a mild, intellectual disability. He has had 2 psychological evaluations that included well validated instruments to measure intelligence and achievement. In both cases, his IQ tested in the mild intellectual disability range. His Full Scale IQ on the WAIS-IV tested at 66 on the first assessment and 67 on the second. Collateral information indicates deficits in achievement throughout his life. Additionally, both psychologists administered testing to assess malingered symptoms at the time of their assessments, and despite him admitting to fabricating hearing voices previously, there was not evidence of malingering with respect to these assessments of his intellectual capabilities.

The above opinion is based on the information submitted and the examination of Mr. Avalos. If there are issues not mentioned in the submitted documentation or if there are additional records relating to this case, which have not been submitted for review, those records may change the conclusion stated above. Please feel free to contact me at 210-335-5044 should you have any additional questions regarding this report or my evaluation of Mr. Avalos.

Respectfully,



Brian P. Skop, M.D.
General and Forensic Psychiatrist
Board Certified by the American Board of
Psychiatry and Neurology

BPS: mg

Cc: file

JOHN MATTHEW FABIAN, PSY.D., J.D., ABPP
BOARD CERTIFIED FORENSIC & CLINICAL PSYCHOLOGIST
FORENSIC & CLINICAL NEUROPSYCHOLOGIST

▪5716 W US Hwy 290, Suite 110 Austin, TX 78735 ▪North Loop 1604 East, Suite 150 San Antonio, TX
78232 ▪Telephone: [512.487.7216](tel:512.487.7216) ▪Fax [512-840-1980](tel:512-840-1980) ▪Email john@johnmatthewfabian.com

FORENSIC PSYCHOLOGICAL EVALUATION
FORENSIC NEUROPSYCHOLOGICAL EVALUATION
MITIGATION SENTENCING EVALUATION

02/18/2019

DEFENDANT: Johnny Avalos
CASE NUMBER: 2016-CR-10374
COURT: 437th District Court, Bexar County, Texas
DATE OF BIRTH: 12/01/1986
AGE: 32 Years
CHARGES: Capital Murder, Aggravated Sexual Assault
DATE OF EVALUATION: 12/18/2018, 01/31/2019

LEGAL REFERRAL:

Jorge Aristotelidis, Attorney at Law, is representing Mr. Johnny Avalos in his criminal court case. Mr. Avalos was initially charged with capital murder with death penalty specifications but qualified for intellectual disability and the death penalty specifications were lifted. He is still charged with murder and aggravated sexual assault. Mr. Aristotelidis wanted me to examine his client relevant to potential mitigation evidence and also requested that I comment as to potential issues related to Mr. Avalos' intellectual disability and how this may apply to a mandatory life without parole sentence. It should be noted that Mr. Avalos is expected to plead guilty on 02/19/2019.

STATEMENT OF NON-CONFIDENTIALITY/INFORMED CONSENT:

Prior to my examination which occurred at both the Bexar County Justice Center jury room as well as the Bexar County jail, I informed him of the nature and purpose of the examination and its limits of confidentiality. Prior to my examination, I told him the nature and purpose of the examination. He had some limited understanding as to this information. I also told him that I was his expert that his lawyer obtained from the court. I informed him that if he and his lawyer wanted to utilize my evaluation for court, then a forensic report would be potentially provided to his lawyer. If they wanted to utilize this report, then the prosecutor and the judge would receive copies. He had some understanding of this limited confidentiality. I told him I could also testify to this case in a court of law. Mr. Avalos had some understanding of the nature and purpose of the examination and its limits of confidentiality and agreed to proceed.

SOURCES OF INFORMATION/EVALUATIVE PROCEDURES:

- 1) Southwest Mental Health Center records

EXHIBIT D

- 2) Southwest General Hospital records
- 3) University Acute Care records
- 4) University Health System Medical records
- 5) Wilford Hall Medical records
- 6) San Antonio ISD Special Education records
- 7) Edgewood ISD records
- 8) Somerset ISD Special Education records
- 9) Lanier High School records
- 10) Northside ISD records
- 11) Texas Assessment of Academic Skills, Confidential Student report
- 12) Video Confession of Defendant 01/26/2016
- 13) San Antonio Police Department records
- 14) Screening for Placement, Judgment of Conviction by Court, Waiver of Jury Trial, Cause number 2014-CR-1149
- 15) Bexar County Community Supervision and Corrections Department records
- 16) Forensic and clinical interview with Mr. Avalos
- 17) Adverse Childhood Experiences Questionnaire (ACE)
- 18) Adult ADHD Self-Report Scales (ASRS-v 1.1 Symptom Checklist)
- 19) Clinical Assessment of Attention Deficit-Adult Version
- 20) Clinical Assessment of Depression
- 21) Delis-Kaplan Executive Function System Stroop Test
- 22) Emotional Perception Test
- 23) Iowa Gambling Task
- 24) Personality Assessment Inventory
- 25) Social Responsiveness Scale-2nd Edition

BACKGROUND FAMILY HISTORY:

Mr. Avalos was born in San Antonio. His biological parents' names are Maria and Michael. He has siblings, Michael who is age 33, Matthew who is in his thirties, Crystal who is in her twenties, Lisa who is in her early twenties, and Andrew who is 19. They are all full-blooded siblings. He also reported having another sister that died when he was about age 9 due to crib death. Mr. Avalos reported that his mother and father separated when he was around age 9 or 10, and his mother was with a man named Raymond. She was with Raymond only a couple of weeks, "He came by often." He believed his mother was having an affair when they separated. He again witnessed sex between his mother and Raymond. He denied his mother ever prostituted herself. He said he had seen her have sex with Raymond on one occasion. He then talked about another man named Roy. He then said he was about 5 or 6 years of age when he saw a man named Roy rape his mother. His mother did not know Roy, "she met him one time." She was staying with Roy's sister in a trailer. He said, "Roy's brother was my mom's friend. My mom was staying with some lady named Brenda." Mr. Avalos stated he was also staying there with his mother. He said he saw Roy choke and rape his mother (explained below).

His mother currently lives in San Antonio with her boyfriend. He does not know the name of her boyfriend. His father lives in San Antonio with his sister.

Mr. Avalos reported that his mother and father married when they were 23. He said that there were always arguments. He initially denied ever witnessing violence. He reported there was physical punishment with belts by his mother, but he did not believe it was abuse. He said there was CPS involvement. "Yes, one time. My dad's neighbor saw my dad whooping us with a belt. I don't know what happened with CPS." He reported no knowledge or beliefs that his mother had any alcohol, drug, legal, or psychiatric problems. He then corrected this and stated that he believes his mother was always getting caught stealing. He said she had jail time but she was not incarcerated in prison. He believed his mother had an eleventh-grade education. She did not work. She was on welfare. He reported no disability for her. He said he received SSI as a youth. He reported his father had some marijuana problems. He said, "he was smoking every day. If he did not have the drug, he would pick a fight with me and my brothers." His father did not have a criminal history. He reported his father had some depression and anxiety. He reported no knowledge of his father having any mental health treatment or medication history.

Mr. Avalos also reported a history of sexual abuse. He said some students in his class took him to the corner, and one of the peers made Mr. Avalos touch his privates in his pants. There was no oral or anal sex, but this touching occurred about three times. I asked him how this made him feel, and he said, "Really weird man and scared." He said, "I really was confused and I didn't know what to say or do." He denied any other history of sexual abuse.

ACADEMIC HISTORY:

Mr. Avalos attended San Antonio Public Schools. He had a history of special education records. He said he was in special education classes his entire academic career. He said the last grade he completed was in 9th grade. He said he was in special education, but he did not know for exactly what classes and during which years. *What is the last grade you completed?* "Seventh." However, he then told me the ninth grade. He was confused, and he then said he completed the seventh grade, but "I dropped out in ninth grade. They moved me up to ninth grade." He said he had a number of suspensions. He said his suspensions were for fighting and smoking in school. He had problems with smoking and the Tourette's Disorder, "Saying shit out loud." He also said, "They would dare me to do things or switch off, and I would do that stuff."

I did review Mr. Avalos' academic records, and they were consistent with special education and intellectual disability.

MILITARY HISTORY:

Mr. Avalos has no military history.

EMPLOYMENT HISTORY:

Mr. Avalos reported working at Rosario's Restaurant in San Antonio. He said he was a dishwasher. He worked there from 2012 until 2015. He said he was fired. He said some things about the manager on Facebook. He said he worked at a temp service and he worked at a

bakery. He said he worked at other restaurants. He said his jobs were not very long, such as two months or a week in duration. The last time he had a job was in 2015. He said he was working a temp service job and working about four days per week. He said he was working in a warehouse.

RELATIONSHIP HISTORY:

Mr. Avalos is a straight male. He reported dating a female for the first time in his childhood when he was about 15 years of age. *Tell me about that.* "That was when we had moved to Poteet for at least one year we stayed there, and I was going to a school called Somerset. We lived on Brooklyn Street, and that's when I started having girlfriends, and yeah, that was the only time, 14-15 years old. Her name was Danielle, and then I moved to San Antonio and we broke up. I guess I got older and then went to school in San Antonio and dropped out, and yeah, I get no girlfriends at all. Like at age 20, 18, 19, 20, 21, all the way until now I get no girlfriends."

What was your self-esteem with these girls? Did you feel like they liked you or not? "No. I -- like when I would talk to them on the phone, I wouldn't know what to say. I wouldn't know how to make them laugh. I was more comfortable talking to guys, like to men, but I was excited to talk to girls. I wasn't scared to walk up to a prostitute and ask them for sex, but I was a wreck with like a non-prostitute, and I couldn't do that."

MENTAL HEALTH HISTORY:

Mr. Avalos reported inpatient psychiatric treatment history. He reported more than five inpatient psychiatric hospitalizations. He reported his first psychiatric hospitalization was around age 8 or 9. He reported hearing voices. He said that they put an EEG on his head during his first hospitalization. "The doctor said schizo...or..." He said the doctor bent down and he said to say words, and "I say me, me, me." He said that "sometimes I will bite my lip." He denied anyone ever telling him he has autism. He said his mother took him there see a doctor. He was scared to go to school and his parents took him to the hospital. He was in the hospital for about a week. He did not follow up with outpatient treatment on a regular basis. He had a hospitalization when he was age 12. This was a psychiatric hospitalization was for the same reason. He said they did tests in which he would lay in the bed and the camera would follow him around in the bed. "My mom said I that was at University Hospital." He did not recall the rest of the hospitalizations. He said he was hospitalized three times.

I asked him about the auditory hallucinations again. He stated that he started hearing voices when he was 8 or 9. He reported that when he was younger his mother and father separated and he and his mother stayed at a friend's house. He reported there was a white lady that would abuse the children. He said, "I just remember getting tortured." There was a guy named Roy there as well. "I remember a woman Tina." He then reported staying with this woman because this was his mother's friend after the divorce. They lived there for about three weeks. There was a guy named Roy, "He didn't do anything to me." I just saw him choke my mother." "I saw him having sex with my mom." He reported no history of sexual abuse to him by anyone at this house. However, it was clear that he saw this rape going on against his mother. He essentially

stayed with his mother with staying with a friend of hers who brought her children with her. Mr. Avalos saw this man named Roy who knew this woman, rape his mother. "I got really scared and angry." There was another man that his mother dated named Raymond. He said, "When I think about it, it gives me nightmares. They are graphic nightmares. She was crying and screaming. He was pulling her by the hair. I remember my mom calling my name." He saw this man rape his mother on one occasion. He said that they stayed a few more days and then went back to San Antonio. He said his brother and sister were not aware of the rape or the sex.

Mr. Avalos added that his mother was having sex in front of him with a man named Raymond. He said his mother did not intentionally have sex in front of him with Raymond. He said he saw this about twice. "This made me feel angry and scared and paranoid. I had nightmares too." "It took me back to Roy." He reported there was no other time that he saw his mother have sex with any other man.

I did ask Mr. Avalos whether he talked to his mother about the sexual abuse by Roy and Raymond that she endured. He said, "She didn't want to talk about it, but I was curious about it." He said that he would bring up discussion of his mother being raped because he remembers it. When he said that he remembered her being sexually assaulted, she acknowledged that she was. He reported talking to his mother about the sexual assault because he heard Roy's voice. He reported hearing Roy's voice when it was quiet and when he was trying to go to sleep." He would hear Roy talking. "I want to fuck your mother again and I wanna make sure you watch."

I talked with Mr. Avalos about whether he heard these voices relevant to schizophrenia or whether the voices were based on traumatic stress. He denied evidence of these issues being relevant to his mental illness. He talked about hearing Roy's voice in his thoughts and then voices. He said, "At the store he hears voices of Roy telling him to put food in his pocket." He said he has command hallucinations. "I feel horny and stuff, I feel like being with a prostitute, and that's when Roy starts coming in and telling me to put food in my pocket." He reported hearing Roy's voice every day. He said he knows not to do it, but then Roy would tell me to do it and would follow Roy's commands. He said that Roy also told him to rape and murder the people, but not all of them. "Some of them I did on my own." He said sometimes it would start inside in the back of his head and other times they are outside. Most of them are outside his head. He said the voices are parts of the day. He reported that the voice of Roy tells him to grab a girl's butt. He reported following the commands sometimes. He did not hear other voices other than Roy. Roy's voice has been steady throughout his life. He said he also sees Roy in dreams. "I see him almost every day." I see him in dreams but not during the day. He said that he has some nightmares about Roy. "I can see him, and he will tell me I'll rape your mom and kill her." He also tells me that there are gangs that come into his cell and beat me up." He said Roy looks like a Mexican dude with a mullet. Mr. Avalos said, "I used to have dreams about my mother being raped by Roy. I would try to help my mother in the dream. I would get so angry. It's like the door wouldn't open and I couldn't get to help her."

I asked him how his mood was, and he said he was depressed in the community, and he also felt sorry for himself. "I was depressed because I did not have a girlfriend." He reported trying to commit suicide in the past. He said that in the world he has had thoughts about suicide but never

attempted it. "I would get scared thinking about suicide." One time he tried to hang himself but the sheet tore. In 2015, he was going to be discharged from his cell. He wanted to end his life. He said he wanted to end his life because of his cases and his legal situation. He reported never trying to cut or burn himself or self-mutilate on purpose. He said that sometimes his mood gets very high. He reported experiencing these high periods of mood about once per week. He gets racing thoughts and talks fast. He reports that sometimes he will have more energy. These symptoms are consistent with mania. He described both mania and depressive mood periods.

As of 01/31/2019, Mr. Avalos stated he was taking Zoloft for depression and anxiety. He reported hearing voices recently who are not there. It should be noted that when I stepped outside, he started laughing and was talking to himself. He said he was not experiencing visual hallucinations other than seeing Roy in his dreams. He said he hears Roy when it is quiet. He said, "When it's quiet, I hear him all the time." He said he hears Roy's voice more in the day than night, even after midnight. He hears him only when it is quiet. He has dreams and nightmares about Roy.

I asked Mr. Avalos about some symptoms of PTSD. He said he was in a car crash in 2006 in which his cousin died. He also said he was sexually abused. He suffered a broken arm. He also reported that his father and uncle were very abusive to him. "Dad beat the shit out of all of us. He physically abused all of my brothers." *Was it bad?* "It was worse when he did not have his weed." He explained he always denied any physical or emotional abuse by his father with all of the other examinations. He did not want his father to get in trouble. "I lived in fear for years. My Uncle Juan would slap me in the mouth and say fuck you and hit me in the face. My uncle locked me up. I remember when we were playing Pearl Harbor as kids and play the actors. My dad would beat us up because we were too loud. My father hit me in the head." He said he never had to go to the hospital. "I remember he had a long stick and hit me in the back with it on one occasion. One time my dad would film me getting beaten. My dad beating me and filming me at the same time." His father was abusive until Mr. Avalos was about 17 years of age. He was living with his father. He said, "We used to live with our uncle, too." He then described his parents were in fact involved with domestic violence. "When I told my dad that my mom was having sex with Raymond and was raped by Roy, he lost it. I also remember seeing my dad get shot in the leg..." He reported he witnessed his father get drunk and his father was looking for his mother as she was giving birth to Mr. Avalos' sister. His father got mad and drunk, and he was picking a fight with his uncle who was also the uncle who abused Mr. Avalos. The uncle called his friends over to beat up his father. They shot him. Mr. Avalos saw the shooting. He again said he lived with his mother and father together until he was about age 23 or 24. He said there was not frequent physical abuse or domestic violence between his parents. He did not have a significant most severe traumatic event, but he said that all of them together cumulatively affected him. "Maybe watching my mom have sex and then get raped was the worst."

Prior Mental Health Records

Mr. Avalos was seen at Southwest Mental Health Center 09/26/2002. He was about 15 years of age. He was making physical threats and assaulting others and hearing voices talking to him.

He was previously diagnosed with ADHD, Tourette's, psychotic disorder, and borderline intellectual functioning. He was diagnosed with adjustment disorder with depressed mood, psychosis not otherwise specified, ADHD, Tourette's disorder, and borderline intellectual functioning. He was prescribed Celexa and Risperdal but he can only ever remember taking Risperdal. He recalled taking the Risperdal for hearing the voices. The records indicate that his threatening and aggressive behaviors have decreased. At times he has been slightly intrusive and manipulative, but he has demonstrated cooperative behavior. His mother has agreed to participate in family therapy. The patient would benefit from individual therapy. He had command hallucinations to hurt his family. He is 15 years of age and was brought in by his mother for increasingly assaultive behavior, and days ago he hit his 5-year-old brother and his 14-year-old brother causing a bloody nose. His mother stated that he threatened to kill his father last night. His mother states that he has become explosive, and the entire family is afraid of him. The major stressor was the patient's room was damaged by a house fire, and the patient lost most of his possessions.

These records indicated the patient endorses auditory hallucinations and command hallucinations to hurt family members. Last night it was the father. He endorsed persistent irritable mood and stopped socializing with friends. He was positive for paranoia, feeling that someone was trying to hurt him. He is mistrustful to others. He is refusing to go to school.

His mother stated that he met milestones and was home schooled since September of 2002. He repeated the eighth grade. He reported again there was positive evidence of command hallucinations and paranoia. He was recommended for psychiatric hospitalization for aggression and paranoia. He was stabilized with a diagnosis of psychosis. His primary diagnosis was psychotic disorder not otherwise specified, and then he also was diagnosed with unspecified Tourette's with rule out of oppositional defiant disorder and conduct disorder. There was also evidence of eating disorder, in which he was eating constantly.

Mr. Avalos stated he did not know why he was here. He admitted he got angry when the house was burned, but he hit the walls and was in a bad mood a lot. He denied threatening anyone's life. He stated that two years ago the voices told him to hurt his brother and sister with a hammer. He said he has Tourette's and talks a lot and has difficulty sleeping. He said he has been aggressive and angry. These mental health records indicated he denied a history of sexual abuse and abuse. He was tested in special ed.

I did review University Health System records dated 02/15/2016. He was diagnosed with major depressive disorder single episode and unspecified. He was prescribed Prazosin as well as Sertraline. He had night terrors and adjustment disorder with mixed anxiety and depression. He had evidence of difficulty with sleeping.

MEDICAL HISTORY:

Mr. Avalos reported having surgery from a motor vehicle crash that he experienced at age 17. He had some intestinal surgery. He also had some surgery on his shoulder area. He reported no

history of head injuries. He reported no concussions ever. He said that he woke up in the backseat of the car. He said he was drunk and had three shots of tequila. He has a history of having been jumped, and he was beaten in the head by gang members in the back of his head. He was not knocked out.

Mr. Avalos reported having a motor vehicle accident when he was about age 17. He said he was in a car with his cousin and his cousin's girlfriend. His cousin was driving. They were all drinking and intoxicated. He said that his cousin was killed. Mr. Avalos suffered from some injuries, including him having to have stomach and intestine surgery, and he also had scars on his right shoulder, and he showed them to me. He reported no head injury in this incident. He said that he woke up in the back seat, and he may have been dazed but denied loss of consciousness. He denied any other history of head injuries and denied a history of seizures. He reported hitting his head in the jail, as three men beat him up, and they were gang members. He denied having loss of consciousness.

There were Southwest General Hospital records indicating tobacco use disorder and asthma as of 04/01/2013. He told me smoked twice a week, "When I was stressed out or paranoid."

Mr. Avalos had Wilford Hall medical records. He was seen one time displaying trauma, admission in December of 2004. He told me that he was in a car accident, which would have necessitated these medical records.

SUBSTANCE USE HISTORY:

Mr. Avalos reported drinking Bud Light up to a case during his adulthood. He denied having a problem with alcohol. He first started drinking alcohol at 16. He said he was using alcohol at age 21, Old English. He would get drunk but did not intend to get drunk. He liked to drink alcohol as it helped with his anxiety and depression. He would drink alcohol when he watched funny movies or listened to music. He developed tolerance to alcohol. He reported drinking one or two 40 ounces of alcohol per drinking. He can control his alcohol use. He would drink with friends when he is drinking. He was drinking alcohol during at least one of his offenses (the first one). He then reported drinking alcohol during all the offenses (I wasn't drunk at the time). He has used alcohol since age 21, drinking two 40 ounces per day but sometimes three. He reported in the community from 2012 to 2015 during the offending span, he was drinking even more alcohol. He was drinking about one 40 ounce of beer per day. He was also on probation. He reported no history of DWIs. He reported losing control of his alcohol use.

He reported having some alcohol related offenses such as participating in harassment. "I would just yell at people and would swear at them while I was riding my bike."

I asked him about his heroin use. He reported using heroin at age 22. He said he liked heroin and the way it made him feel. "It made me feel down and out." He was snorting and injecting the drug. He says he liked heroin because it made him more outgoing and less depressed. He never developed tolerance or withdrawal with heroin. He said he was using heroin for seven years. He reported during this time not having a girlfriend or wife, but he was using heroin and

he did not care and was just happy and carefree. He was snorting and injecting it. He liked the injection effects better. He said the last time he used heroin was in 2014. "I was not hooked on it in that timeframe in 2014." He stated he was using it very rarely. He stopped using heroin regularly in 2011. He reported he stopped using it regularly because he did not have the money for it.

Mr. Avalos stated at age 16 he was using cocaine about once per week. *What did you like about cocaine?* "It made me feel wired. It made me feel numb, and I enjoyed it." He denied feeling sexually aroused on the drug. He said he was using cocaine once per month. He denied using crack cocaine. He reported using cocaine the last time in 2014. He was not using it regularly.

He reported using methamphetamine one time. He denied using PCP or LSD. He reported getting a Vicodin prescription for his surgery from the MVA. He did report abusing it with the use of marijuana. He denied using ecstasy, Valium, or uppers or downers. He reported that he first started using marijuana at age 14. He was using marijuana every day. He reported marijuana made him feel paranoid while he was doing the drug. He was using a dime bag of marijuana per week. He was smoking every day, about two joints per day. He did perceive that he had a problem with marijuana. "It made me in a bad mood if I didn't have it." He reported participating in rehabilitation a couple of times. He said this was outpatient rehab program. He was supposed to live there, but then he left and did not go back. He said he went to the same program the second time. He did not finish the program. He said that these programs were not court ordered.

LEGAL HISTORY:

Mr. Avalos stated to me that he had never had a juvenile criminal history. He was never in a gang. Mr. Avalos had a criminal court case, 2014-CR-1149 in Bexar County with possession of a controlled substance, less than 1 gram. He was in the mental impairment caseload. He began probation on 04/11/2014 and that expired 04/10/2016. The reason for referral is because the offender had reported being diagnosed with Tourette's syndrome and depression. He took Zoloft in the BCJ from 11/28/2013 to 04/14/2014. He reported daily heroin and marijuana use prior to incarceration on 11/20/2014. He reported using heroin daily at age 21. He stopped using for two years because he detoxed himself and then started using again five months ago. He reported using marijuana daily since age 14. He stated he stopped using marijuana during his previous probation term.

There was a Treatment Alternatives to Incarceration Program (TAIP) and substance use evaluation report. It was recommended that he had a dual diagnosis and have intensive aftercare. He was using alcohol daily, heroin daily, cocaine once per week, amphetamine one time only, and cannabis daily.

The Bexar County Supervision and Corrections Department Substance Abuse Treatment Program was a 30-day program. He had problems with attendance. Although he expressed his motivation to remain sober, he is not doing everything he can to assist himself with sobriety, such as attending NA meetings.

Nature of Instant Offense

Concerning the instant offense, Mr. Avalos was charged with capital murder and aggravated sexual assault. This was a death penalty case, but he was found intellectually disabled, and the death penalty specifications were dismissed. He was indicted for the capital murder of 15-year-old Natalie Chavez and aggravated sexual assault on 12/18/2014. He also allegedly killed 20-year-old Rosemary Perez who was found on 01/12/2015. He is accused of killing 29-year-old Celia Lopez and 45-year-old Genevieve Ramirez. Celia Lopez was found on 04/15/2015, while Genevieve Ramirez was found on 04/30/2015. He also has been charged with the murder of 25-year-old Vanessa Lopez who was found in October of 2012. He is accused of killing Natalie Chavez, Rosemary Perez, Celia Lopez, and Genevieve Ramirez in a four-month span. These alleged offenses occurred between December of 2014 and April of 2015. Some of these women had been involved in prostitution. The indictment indicated that Mr. Avalos allegedly asphyxiated Rosemary Perez on or about 01/10/2015. He allegedly asphyxiated the alleged victims (Chavez, Perez, and Lopez) with plastic bags.

PRIOR NEUROPSYCHOLOGICAL EVALUATION:

Mr. Avalos was administered neuropsychological assessment with Joan Mayfield, Ph.D., psychologist. Dr. Mayfield examined him in November 2018. She found that he exhibited good effort in his neuropsychological testing. His general reasoning on the Test of General Reasoning Ability (TOGRA) was severely impaired. Verbal fluency skills were average for letter and category fluency but moderately impaired on a category switching task assessing cognitive flexibility and shifting. He also had some impairments on other card sorting tasks and sort recognition tasks. Spatial learning and planning and rule following skills on a Tower Test were average. His sound perception was mildly to moderately impaired. Sustained visual attention skills on a continuous performance test relevant to ADHD and individual attention were average. Executive functioning on a Wisconsin Card Sorting Test (WCST) assessing nonverbal abstract reasoning abilities and ability to form concepts with limited feedback was average for categories completed. However, he took a number of trials to complete the first category and also had below average in perseverative responses.

Psychomotor processing speed skills in a Trail Making task were below average. On a mental set shifting Trail Making task, the results were severely impaired. On an interference Stroop task, there was evidence of mild impairment indicating disinhibition issues. He was administered the Test of Memory and Learning-2 (TOMAL-2). The results on the Verbal Memory Index were severely impaired, Nonverbal Memory Index were mildly to moderately impaired, and the Overall Composite Memory Index was severely impaired. The Attention/Concentration Index was below average, Sequential Recall Index was below average, and Free Recall Index was mildly impaired as was Associate Recall Index. Delayed Visual Recall Index was moderately impaired. He had difficulty learning and recalling this information. Further language skills for expressive and receptive language abilities were significantly impaired. On an academic achievement battery, listening comprehension skills were also severely impaired. His motor and visual perceptual skills were between the severe impairment to

average ranges. Overall manual dexterity and grip strength in both hands were typically in the average ranges.

Mr. Avalos was also administered the Wechsler Adult Intelligence Scale-IV (WAIS-IV) with a Full Scale IQ of 66, 1st percentile and mild intellectual disability range. Verbal Comprehension Index was a standard score of 66, 1st percentile; Perceptual Reasoning Index was a standard score of 71, 3rd percentile; Working Memory Index was a standard score of 69, 2nd percentile; and Processing Speed Index was a standard score of 81, 10th percentile.

Mr. Avalos was administered the Wide Range Achievement Test-4 (WRAT-4) with the following scores:

	<i>Standard Score</i>	<i>Percentile Rank</i>	<i>Grade Equivalent</i>
<i>Word Reading</i>	91	27	10.8
<i>Sentence Comprehension</i>	64	1	3.6
<i>Spelling</i>	81	10	6.3
<i>Math Computation</i>	67	1	3.7
<i>Reading Composite</i>	75	5	N/A

CURRENT NEUROPSYCHOLOGICAL & PSYCHOLOGICAL TESTING RESULTS:

Attention Functioning

Mr. Avalos was administered the Clinical Assessment of Attention Deficit-Adult Version (CAT-A) to assess for childhood memory and adulthood symptoms of ADHD. He had typical responses on all of his validity scales. His childhood memory scales were in the very significant clinical risk range for inattention and mild clinical risk range of impulsivity and normal range for hyperactivity. He reported these symptoms of inattention and impulsivity affect his personal, academic/occupational, and social functioning all in the mild clinical risk range. His overall Childhood Memories Clinical Index was in the mild clinical risk range.

His adulthood symptoms were in the mild clinical risk range for inattention and impulsivity, affecting his academic/occupational skill sets in the significant clinical risk range and social area

of functioning in the mild clinical risk range. His overall Current Symptoms Clinical Index was in the mild clinical risk range. Similarly, his clinical index overall for childhood memories and adult symptoms were in the mild clinical risk range.

Mr. Avalos was administered the Adult ADHD Self-Report Scales (ASRS-v 1.1 Symptom Checklist) to assess for symptoms of ADHD. He scored below the typical threshold for ADHD. He did have traits such as having trouble wrapping up final details of a project once the challenging parts have been done. He has difficulty getting things in order when he has a task that requires organization. He has difficulty remembering appointments or obligations. He also reported having problems keeping his attention when he is doing boring or repetitive work. From a clinical qualitative assessment, he did not reach the threshold for ADHD.

Executive Functioning

Mr. Avalos was administered the Iowa Gambling Task which is a test of decision making. The objective is to pick low risk and low reward cards and avoid risky cards with high gains and even higher losses. He scored in the average range. There was no significant evidence of impairment on this test.

Mr. Avalos was administered the Delis-Kaplan Executive Function System (D-KEFS) to assess for executive functioning skill sets. He was administered the Color Word Interference Stroop Test. Color processing was below average (16th percentile) while word reading skills were severely impaired (1st percentile). On an inhibition of an automatic response task, the results were moderately impaired (2nd percentile).

Emotional Perception

Mr. Avalos was administered the Emotional Perception Test (EPT) which is a task in which he listens to statements and is asked to judge the correct emotional that goes along with the statement. What is important is how the individual says the statement rather than what is actually said. He scored with 24 errors. The authors indicate scores above 19 are indicative of significant impairments.

I administered him the Social Responsiveness Scale-2 (SRS-2) to assess for symptoms of autism spectrum disorder. He scored below the cutoff for Social Awareness. He scored in the clinically significant range for Social Cognition, Social Communication, Social Motivation, and Restricted Interests and Repetitive Behaviors. His overall score met the DSM-5 Social Communication and Interaction, Restricted Interests, and Repetitive Behavior thresholds for a diagnosis of autism spectrum disorder.

Psychopathology

Mr. Avalos was administered the Personality Assessment Inventory (PAI) to assess for psychopathology, personality, and emotional functioning. The results indicated that he scored with an elevation on the inconsistency scale and he answered similar questions inconsistently on

the protocol. The protocol was not valid perhaps due to his poor reading skills.

Mr. Avalos was administered the Clinical Assessment of Depression (CAD) to assess for symptoms of depression and anxiety. The results indicated typical range of validity. There was no evidence of exaggeration of pathology. Depressed Mood was in the very significant clinical risk range, while Anxiety/Worry as well as Diminished Interest and Cognitive and Physical Fatigue were all in the severe clinical risk range. His overall CAD total scale score was in the very significant clinical risk range.

Mr. Avalos' background was rated via the Adverse Childhood Experiences Questionnaire (ACE) to assess for childhood traumatic experiences. The instrument was developed with Kaiser Permanente Medical Group and the Center for Disease Control (CDC). The groups administered the ACE Questionnaire and then also examined their medical conditions. There was a relationship between stressful life events and medical, psychiatric, legal/criminal, and substance abuse consequences. Mr. Avalos scored a likely 7 to 8 on the questionnaire. Scores of 4 or more are closely correlated with negative life outcome.

The studies examined the relationship between ACE's and a variety of mental risk factors for disease, disability, and early mortality. Division of Violence Prevention, Center for Disease Control and Prevention, and Kaiser Permanente created a landmark ACE study from 1995 to 1997 assessing more than 17,000 participants. They found that ACE's are common and that almost 40% of the sample reported two or more ACE's and 12.5% experienced four or more risk factors. The ACE's exhibit responses in relationship with many health problems. Research has followed the participants over time and has discovered the person's cumulative score has a strong common relationship to numerous health, social, and behavioral problems throughout their lifespan, including substance use disorders. There has been more recent research on ACE scores being related to criminal offending.¹ His score was 7 or 8, and the maximum score is 10 on the protocol. His score is quite high. He endorsed significant traumatic events such as physical, emotional, sexual abuse, substance use in the home, parental separation and divorce, and emotional neglect. The ACE results are also consistent with a history of polytrauma

CURRENT MENTAL STATUS/BEHAVIORAL OBSERVATIONS:

Mr. Avalos is a 32-year-old single, Hispanic-American male. He arrived to the interview wearing standard jail attire. Hygiene and grooming were adequate. He was correctly oriented in all spheres but believed it was 12/17/2018 when it was 12/18/2018. He knew where he was and knew his birthdate. During the evaluation his affect was flat. He had poor verbal skills. He did not elaborate on many of his answers. However, when I began reading records, I gave him some time just to sit there, and he was laughing to himself. I asked him what he was laughing about. He said he was thinking about some guy that is locked up with him in his cell. His affect was inappropriate. At times he looked around as though he was internally preoccupied. I asked him if he was hearing voices, and he started laughing, and he said that he was. He said the voice told

¹ Reavis, et al. *Adverse Childhood Experiences in Adult Criminality: How Long Must We Live Before We Possess Our Own Lives?* Permanente Journal (2013, Spring): 17, 2, 44-48

him to ask me what I had for breakfast in the morning. His affect was constricted and mood was stable. He endorsed some depression. He denied current suicidal or homicidal ideation, plan, or intent. He was cooperative during the evaluation and never hostile or aggressive.

CURRENT DSM-5 DIAGNOSTIC FORMULATION:

Intellectual Disability, Mild

Schizoaffective Disorder, Mixed Type by History

Probable Autism Spectrum Disorder by History

Posttraumatic Stress Disorder with Complex Trauma

Alcohol Use Disorder

Opioid Use Disorder

Cannabis Use Disorder

FORENSIC OPINION:

I was asked to examine Mr. Avalos for a forensic psychological and neuropsychological evaluation. Mr. Aristotelidis had stated to me that his client wanted to take a plea bargain for life without parole. Mr. Aristotelidis wanted me to continue to provide a mitigation assessment report.

In summarizing Mr. Avalos' life, he was born in San Antonio. He has brothers, Michael, Andrew, and Matthew, and sisters, Crystal and Lisa. He reported his mother and father separated when he was about 9 years of age. His mother then married a man named Raymond.

Mr. Avalos reported a significant history of numerous traumas experienced throughout his life. He said that he witnessed sex between his mother and a man named Raymond who she got together with. He then saw a man named Roy rape his mother. Mr. Avalos reported that he did not witness domestic violence between his parents. There were physical punishments with belts by his mother. There was CPS involvement relevant to neighbors witnessing his father physically discipline them with a belt.

Mr. Avalos also reported his own history of sexual abuse. Some of the students in his class took him into the corner and sexually abused him. There was fondling but no penetration. He said this sexual abuse caused him to be confused.

Mr. Avalos did not know of any birth complications or developmental delays. He lacked insight into the nature of his intellectual disability.

Academically, Mr. Avalos attended San Antonio public schools. He was involved with special education classes and completed seventh or ninth grade. He was uncertain what grade he last completed. He lacked insight into the nature of his special education needs and services. His academic records, however, were consistent with special education and intellectual disability.

Mr. Avalos worked at Rosario's Restaurant in San Antonio as a dishwasher for a few years until about 2015 but was fired. He said he had a number of jobs that were a week to a month in length and that he had difficulty keeping regular employment. These academic and vocational employment issues certainly were consistent with intellectual disability.

From a mental health perspective, Mr. Avalos reported inpatient psychiatric treatment history. He said that he had about five inpatient psychiatric hospitalizations beginning at least around 8 years of age. He reported auditory hallucinations beginning around then and believed he had schizophrenia. He was also paranoid as a youth. He said he was hospitalized again for psychiatric reasons at 12 years of age. He then corrected this and said he believed he was hospitalized on about three occasions. It should be noted at times during the examination Mr. Avalos was not a good, clear, consistent historian.

During the examination, Mr. Avalos reported again experiencing auditory hallucinations around 8 or 9 years of age. He also apparently experienced some visual hallucinations. There was a fusion between auditory and visual hallucinations along with symptoms of posttraumatic stress disorder. He seemed to report seeing and hearing voices, such as from a man named Roy, who was the man he reported seeing rape and choke his mother. He also said there was another man, Raymond, who dated his mother. He said that he had seen this man named Roy rape his mother and then saw this man named Raymond pulling his mother by the hair and raping his mother.

During the examinations, there was again a confusion and potentially fusion between symptoms of schizophrenia and posttraumatic stress disorder (the latter relevant to dissociative-type phenomenon). He again stated his mother was having sex in front of him with a man named Raymond, which he had seen a couple of times. Therefore, he had experienced auditory hallucinations and other psychotic features and potentially dissociative posttraumatic stress disorder type of reactions related to men having sex and/or raping and assaulting his mother.

As noted, I talked with Mr. Avalos about whether these hallucinations were relevant to schizophrenia or posttraumatic stress disorder. He then denied evidence of these issues being pertinent to mental illness. He believed they were actual real phenomenon that he experienced. He again focused on hearing Roy's voice and having auditory commands.

I talked with Mr. Avalos further about symptoms related to posttraumatic stress disorder some of which he endorsed. He said he had seen a car crash in which his cousin died. He also said he

was sexually abused. He reported his father and uncle were very abusive to him and there was physical and emotional abuse. He said his father filmed beating him on one occasion. He described his parents were, in fact, involved with domestic violence. He commented to me, "When I told my dad that my mom was having sex with Raymond and was raped by Roy, I remember seeing my dad lose it and then get shot in the leg." He stated that his father abused his mother and was very jealous. He also said that his father would often abuse alcohol and would beat and assault people in the family. On one occasion, his uncle called his friends over to beat Mr. Avalos' father and they shot him. He reported that watching his mother have sex and getting raped was the worst traumatic event he has ever experienced.

I learned Mr. Avalos was seen at Southwest Mental Health Center in 2002 at around 15 years of age. At that time, he had behavioral and emotional problems and was experiencing auditory hallucinations. He had been previously diagnosed with attention deficit hyperactivity disorder, Tourette's disorder, psychotic disorder, and borderline intellectual functioning as well as adjustment disorder, and depressed mood. He was prescribed the antidepressant, Celexa, and antipsychotic, Risperdal.

These records are certainly concerning due to Mr. Avalos' young age and history of schizophrenia even around age 15. At that time, he had command hallucinations to hurt his family. He was recommended for psychiatric hospitalization for aggression and paranoia and stabilized with a diagnosis of psychosis which was his primary diagnosis. University Health System records dated 02/15/2016, while he was in jail, included a diagnosis of major depressive disorder and he was prescribed Prazosin and Sertraline.

Mr. Avalos reported having surgery from a motor vehicle accident experienced at 17 years of age, which was intestinal surgery. He initially reported no history of head injuries. However, he did report waking up in the backseat of a car and being intoxicated. He also reported having a history of being jumped and beaten in the head by gang members. He stated, as noted, that he was in a motor vehicle accident in which his cousin died. He lacked insight, in my opinion, as to the number of potential severity of concussions suffered throughout his life. He reported hitting his head in the jail.

In addition to the psychiatric symptoms that he has exhibited, Mr. Avalos reported drinking and using and abusing alcohol. He reported developing tolerance at times but believing he can control his use of alcohol. He also reported using and abusing heroin, last in about 2014. He also used and abused cannabis. He does present with evidence of polysubstance use disorders and dependence and a dual- and even tri-diagnosis condition (explained below).

Mr. Avalos was tested initially by Joan Mayfield, neuropsychologist. He had a Full Scale IQ on the WAIS-IV of 66 with Verbal IQ of 66, Perceptual Reasoning IQ of 71, Working Memory IQ of 69, and Processing Speed IQ of 81. These scores are consistent with intellectual disability. The WRAT-4 also had significant impairments regarding reading composite and math computation score, all in the intellectually disabled ranges. On the TOGRA, he had significant impairments with both speeded problem solving and reasoning. He also exhibited deficits with verbal category switching, sound perception, psychomotor processing speed skills, mental set

shifting, verbal memory and learning, and receptive and expressive language skills and listening comprehension deficits. He had global neuropsychological and cognitive dysfunction. The cognitive deficits noted here would be consistent overall with an intellectual disability, mild.

It is my opinion with a reasonable degree of psychological and neuropsychological certainty that Mr. Avalos qualified for intellectual disability, mild, and schizoaffective disorder, mixed type, with likely evidence of both manic and depressive states. Along those lines, he has experienced auditory and visual hallucinations. He also qualifies for posttraumatic stress disorder and complex trauma. In my opinion, he very well could have qualified for autism spectrum disorder and current psychological testing was consistent with these symptoms. Autism spectrum disorder is a developmental disorder. He had evidence of schizophrenia at least by age 15 (adolescent schizophrenia). Autism spectrum disorder and schizophrenia spectrum disorder share clinical and genetic components that have long been recognized. The two disorders co-occur more frequently and would be predicted by their respective prevalence suggesting that a complex multifactor association is involved. It is very likely that Mr. Avalos did qualify for autism spectrum disorder as a youth along with schizophrenia.

I also would focus on the issue of posttraumatic stress disorder and complex trauma. The latter is a psychological disorder that can develop in response to prolonged repeated experience of interpersonal trauma in the context in which the individual has little or no chance to escape. It describes both children's exposure to multiple traumatic events often of an invasive and interpersonal nature with wide-ranging, long effects of this exposure. Mr. Avalos has experienced emotional abuse and neglect, physical and sexual abuse, and domestic violence. These traumatic experiences were intense and even chronic during his childhood and adolescence.

I certainly have concerns about how all of these disorders and conditions could affect Mr. Avalos' brain development. Obviously, intellectual disability is a neurodevelopmental disorder which is a compromise in early brain and central nervous system development. This can include developmental brain dysfunction which manifests as neuropsychiatric problems and impaired functioning in overall learning, language, adaptive functioning, nonverbal communication, etc. The intellectual disability represents a global and diffuse brain disorder. As noted, Mr. Avalos has numerous impairments in basically all neuropsychological areas of functioning.

As noted, neurodevelopment disorders are impairments in the growth and development of the brain or central nervous system and may refer to a disorder of brain function that affects one's emotion, learning ability, self-control, memory, and executive functioning.

Unfortunately, Mr. Avalos had evidence of intellectual disability during his developmental years as well as schizophrenia. Schizophrenia also is a neuropsychiatric disorder and has significant neurological and neuropsychological consequences and effects on the brain. I have concern that, because Mr. Avalos had an intellectual disability and childhood trauma, he may have been more

susceptible to the development of schizophrenia.² He had evidence of childhood onset of schizophrenia. Early onset of schizophrenia has been noted to include a compromise in cortical brain development.³ In addition, there are often noted neuropsychological impairments in schizophrenia. In this case, these cognitive deficits may be attributable to not only intellectual disability but also schizophrenia.^{4 5}

In addition, Mr. Avalos' brain development also could be affected by the biological and neurobiological effects of trauma.⁶ Developmental traumatology includes a systematic investigation of psychiatric and psychobiological effects of chronic overall stress in a developing brain. Traumatic stress is thought to lead to changes in sequential development of brain structure and brain functioning, especially in the areas of the limbic system and frontal lobe.⁷

Therefore, Mr. Avalos had three areas that are relevant to potential brain dysfunction during his developmental years including intellectual disability, complex trauma, and schizophrenia. These three disorders are major brain disorders, especially that could impact the growth, development, structure, and functioning of the brain during the individual's developmental years and into adulthood.

The U.S. Supreme Court in *Miller v. Alabama* 567 U.S. 460 (2012) held that mandatory sentences of life without the possibility of parole are unconstitutional for juvenile offenders.

Obviously, Mr. Avalos is not a juvenile offender but committed these offenses as an adult.

² Murray, RM, Jones P., O'Callaghan E. *Fetal Brain Development and Later Schizophrenia*. Ciba Foundation Symposium (1991); 156: 155-63.

³ Gogtay, Nitin. *Cortical Brain Development in Schizophrenia: Insights from Neuroimaging Studies in Childhood Onset*. Schizophrenia Bulletin (Jan 2008); 34(1): 30-36.

⁴ Hill, S. Kristian, et al. *Neuropsychological Impairments in Schizophrenia and Psychological Bipolar Disorder: Findings from the Bipolar-Schizophrenia Network in Intermediate Phenotypes (B-SNIP) Study*. American Journal of Psychiatry (Nov 2013); 170(11): 1275-1284.

⁵ Reichenberg, Abraham. *The Assessment of Neuropsychological Functioning in Schizophrenia*. Dialogues in Clinical Neuroscience (Sep 2010); 12(3): 383-392.

⁶ De Bellis, Michael D., Zisk, Abigail. *The Biological Effects of Childhood Trauma*. Child and Adolescent Psychiatric Clinics of North America (Apr 2014); 23(2): 185-222.

⁷ McCrory, E., De Brito, SA, Viding E. *Research Review: The Neurobiology and Genetics of Maltreatment and Adversity*. (Journal of Child Psychology and Psychiatry); 51, 1079-1095.

However, in my opinion, he is functioning more like an 8-year-old due to his intellectual disability and his lawyer, Mr. Aristotelidis, wants to consider a legal argument that applies the holding in *Miller* to an adult that is intellectually disabled and brain damaged and functions more like a child. Mr. Avalos essentially thinks, acts, and behaves in many ways as a child or adolescent because of his significant brain dysfunction, intellectual disability, and mental illness.

Mr. Avalos presents as a tri-diagnosed individual with the following three areas of diagnoses and dysfunction:

1. Brain dysfunction through intellectual disability
2. Mental illness related to posttraumatic stress disorder/complex trauma and schizophrenia
3. Co-occurring chemical dependency problems to alcohol, cannabis, and opioids

There is compelling evidence of impairments as to Mr. Avalos' brain function. Despite him being an adult, he again has a damaged and dysfunctional brain that would be pertinent to impairments in a number of areas, especially related to overall intelligence, language and executive functioning. The holding in *Miller* certainly includes the USSC recognizing developmental characteristics of adolescents and recent neuroscience research showing that adolescent brains are not fully developed in regions related to higher order executive functions such as impulse control, planning ahead, and risk evaluation. That neuroanatomical deficiency is consonant with juveniles demonstrating psychosocial, social, and emotional immaturity. Along these lines, Mr. Avalos has brain damage and dysfunction related again to his history of intellectual disability coupled with neuropsychiatric disorders of schizophrenia and complex trauma/posttraumatic stress disorder. These conditions cumulatively place him with significant emotional, cognitive, and behavioral impairments that leave him functioning in a childlike fashion. Consequently, these detrimental conditions affecting his brain functioning should be considered as to his overall moral culpability and ultimately as to his sentencing.

Respectfully submitted,

John Matthew Fabian

/s/ John Matthew Fabian

e signature

John Matthew Fabian, PSY.D., J.D., ABPP
Board Certified Forensic & Clinical Psychologist
Forensic & Clinical Neuropsychologist